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No. 06-

IN THE

Supreme Court of the United States

JANET M. MERILLAT,

Petitioner,

v.

METAL SPINNERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The "honest belief" rule is used by the lower courts in employment discrimination claims to weigh the evidence of pretext within the *McDonnell Douglas* burden shifting test.

One question is presented for review:

1. Does the following formulation of the "honest belief" rule provide the correct legal standard for evaluating whether a genuine issue of material fact exists on the issue of pretext in Title VII and ADEA employment discrimination claims?

> Our only task is to determine whether [the employer] "honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless."

(14a), *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 693 (7th Cir. 2006, *comment added, internal quotations court supplied*).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Background	2
B. District Court Proceedings	4
C. The Seventh Circuit's Disagreement With The District Court's Grant Of Summary Judgment On Merillat's *Prima Facie* Case ..	5
D. The Seventh Circuit's Analysis Of Merillat's Evidence Of Pretext Under The "Honest Belief" Rule	6
E. Conclusion Of The Seventh Circuit Affirming Summary Judgment On Pretext.	16

Contents

Page

REASONS FOR GRANTING THE PETITION ... 17

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE HONEST BELIEF RULE IS THE PROPER STANDARD TO EVALUATE EVIDENCE OF PRETEXT IN TITLE VII AND ADEA CLAIMS UNDER THE *MCDONNELL DOUGLAS* BURDEN SHIFTING TEST 17

A. The Honest Belief Rule Is In Conflict With Statements Of This Court And It Strikes The Wrong Balance Between The Role Of The Reviewing Court On Summary Judgment And The Finder-Of-Fact At Trial. 17

1. Introduction: The Honest Belief Rule May Erroneously Validate "Honest" Preferences Based On Illegal Criteria. 17

2. The Honest Belief Rule Conflicts With Statements Of This Court ... 19

B. A Split Of Authority Has Developed In The Circuits Regarding Whether The Proper Test For Evaluating Evidence Of Pretext Should Apply A Subjective Or An Objective Standard 21

Contents

Page

D. The Facts of This Case Present An Excellent Opportunity For Considering The Question Presented 24

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) 23

Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006) 20

Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999, *overruled on other grounds*) 22

EEOC v. Sears Roebuck and Co., 243 F.3d 846 (4th Cir. 2001) 22

Gustovich v. AT & T Communications, Inc., 972 F.2d 845 (7th Cir. 1992) 27

Jackson v. E.J. Brach Corp., 176 F.3d 971 (7th Cir. 1999) 20

Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672 (7th Cir. 1997) 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Merillat v. Metal Spinners, Inc., 470 F.3d 685 (7th Cir. 2006) ..... i, 1, 12, 17

Cited Authorities

Page

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 20

Rojas v. Florida, 285 F.3d 1339 (11th Cir. 2002) .. 22

Ryther v. KARE 11, 108 F.3d 832 (8th Cir. 1997) ..22, 23

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 20

Smith v. Chrysler, 155 F.3d 799 (6th Cir. 1998) ...22, 23

Smith v. City of Jackson, 544 U.S. 228 (2002) 21

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 19, 20

Venturelli v. ARC Community Services, Inc., 350 F.3d 592 (7th Cir. 2003) 19

Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054 (9th Cir. 2002) 22

Zapata Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002) 22

Cited Authorities

Page

Federal Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 623 ..... 1, 4

29 U.S.C. § 623(f)(1) 21

42 U.S.C. § 2000e-2 ..... 2, 4

Law Journal Articles:

Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006) 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided December 6, 2006 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Northern District Of Indiana, Fort Wayne Division Entered September 19, 2005 ..... 26a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685 (7th Cir. 2006). The opinion of the United States District Court for the Northern District of Indiana is unofficially reported at *Merillat v. Metal Spinners, Inc.* 2005 WL 2304753 (N.D. Ind. 2005).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Seventh Circuit's opinion was rendered on December 6, 2006. No petition for rehearing was filed.

STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, Section 623.

Prohibition of age discrimination.

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause.

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

Title 42 United States Code, Section 2000e-2.

Unlawful employment practices.

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

STATEMENT OF THE CASE

A. Background

The issue posed for review arises under federal labor laws that prohibit workplace discrimination. In 1983, the petitioner Janet Merillat, ("Merillat") began employment with respondent Metal Spinners, Inc. ("Metal Spinners"). (2a). Metal Spinners provides a variety of metal-forming services. (2a) For several years up to the events here, Merillat was in charge of the metals department, holding the title "Purchase Manager." (2a; R. 479).[1] In November, 2002, the Chief Executive Officer of Metal Spinners, Olin Wiland ("CEO Wiland"), newly hired a younger

1. "R." designates record citations to Merillat's appendix in the Seventh Circuit.

male employee from outside the company, Craig Wehr ("Wehr")[2] to take over the metals department with a newly created title of "Vice President of Metals."[3] (3a). Metal Spinners denied Wehr replaced Merillat in her former position as head of metals. (R. 38, par. 12). However, the underlying tasks were exactly the same. (R. 481-82). The new younger male employee was started at $62,500.00 annually, while Merillat had been paid $49,800.00.[4] (R. 386, 427-28, 441).

During CEO Wiland's first discussion with Merillat about the new male employee, he ordered Merillat take down a cartoon lampooning discriminatory pay scales for women in the workplace. (3a). While the cartoon had been openly posted in Merillat's office for many years, Wiland had never before commented upon it–until he hired Wehr. (3a; R. 464).

Merillat was not immediately terminated, rather she was retained for a brief period, during which she trained Wehr in all aspects of her job at CEO Wiland's instruction. (R. 469, 442). Six (6) months later, she was gone. (3a). When CEO Wiland informed Merillat of his decision, she was told the termination was part of a reduction in force ("RIF") and *had nothing to do with her job performance*–that it was a "strictly economic" decision. (R. 443-44, 460-61).

In the alleged RIF, Metal Spinners terminated one other employee, transferred another employee to production and

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2. Wehr was 38 years old, and Merillat 49, at the relevant time periods. (4a).

3. At the same time, Merillat's title of "purchase manager" was eliminated, and Wiland gave her the lesser title "senior buyer." (2a).

4. The job description for Wehr's "new" vice-presidential position was a description of the job Merillat was performing. (R. 482). Also, in deposition, Wehr thoroughly described his work duties. (R. 318-79, 384). Those functions were all previously performed by Merillat. (R. 475). The major responsibilities were the same. (R. 468).

another employee retired. (3a-4a). However, when examining the staffing of the metals department, the employer's overall decision, to hire Wehr and fire Merillat, left the number of employees operating that department exactly the same.[5]

As to choosing to include Merillat in the RIF (instead of Wehr) based on a "strictly economic" decision; Wiland knew it would cost more in salaries to run the metals department under Wehr than it had under Merillat. (R. 417-18, 427).

After suit was filed, Metal Spinners asserted additional reasons why it preferred to hire Wehr and terminate Merillat. All reasons given, both at termination and after suit was filed, are discussed hereafter within the context of the lower court decisions.

B. District Court Proceedings

On May 14, 2004, Merillat filed her complaint in United States District Court for the Northern District of Indiana. (R. 30). The complaint alleged Metal Spinners had intentionally discriminated based on age and sex in violation of 42 U.S.C. § 2000e-2 ("Title VII") and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623).[6] After discovery, Metal Spinners filed a motion for summary judgment arguing Merillat could not establish a *prima facie* case on the *McDonnell Douglas* prongs of: 1) satisfactory performance; or, 2) any similarly situated employee treated more favorably. (R. 46). In

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5. Before November 2002, the metals department consisted of Merillat and one clerical subordinate. (R. 267-68). After June 3, 2003, the metals department was Wehr and one clerical subordinate–*sans* Merillat. (R. 415-17). Obviously, for the brief time from Wehr's hire to Merillat's termination, the metals department temporarily consisted of three (3) employees.

6. (R. 30). Merillat had also asserted a federal Equal Pay Act claim for the 6 months she and Wehr temporarily worked together (denied below).

the alternative, Metal Spinners argued its reasons for preferential treatment of the new younger male employee could not be shown to be pretext. (R. 46). Merillat responded with evidence supporting the *prima facie* case, and evidence showing that each of the employer's stated reasons were objectively unworthy of credence. (R. 282, 297).

The district court agreed with the employer on all issues, granting summary judgment to Metal Spinners on September 19, 2005. (26a).

C. The Seventh Circuit's Disagreement With The District Court's Grant Of Summary Judgment On Merillat's *Prima Facie* Case.

The Seventh Circuit held the district court erred in granting summary judgment on the *prima facie* case.[7] Where the district court erroneously found unsatisfactory performance, the Seventh Circuit recognized that prior years of Merillat's work evaluations were "largely positive."

> In her 2001 evaluation, Ms. Merillat received an "excellent" rating in ten categories and "satisfactory/good" ratings in seventeen categories, with no categories rating below "satisfactory/good."2 See R.36 at 14-15.
>
> * * *
>
> Similarly, in her 2002 evaluation, she received one "outstanding" rating, ten "excellent" ratings and sixteen "satisfactory/good" ratings, with no category rated lower than "satisfactory/good." Id. at 18-19.
>
> * * *

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7. There was no dispute before the district court that Merillat was in a protected class with respect to both her age and her sex, and that she suffered an adverse employment action. (10a).

> Additionally, she did receive a raise that stated it was based, in part, on her performance. Therefore, summary judgment for Metal Spinners on this prong would be inappropriate.

(11a-13a). On the issue of Wehr not being similarly situated, the Court of Appeals likewise disagreed with the district court's ruling.

> There is agreement that a good deal of Ms. Merillat's responsibilities were assumed by Wehr, who is neither female nor within the protected age group. We therefore must conclude Ms. Merillat has met this prong of the modified *McDonnell Douglas* test.

(13a).

D. The Seventh Circuit's Analysis Of Merillat's Evidence Of Pretext Under The "Honest Belief" Rule.

While rejecting the district court's conclusions on the *prima facie* case, the Seventh Circuit affirmed the lower court on the issue of pretext under the "honest belief" rule.

> Our only task is to determine whether [the employer] 'honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.'

(14a). The court of appeals held that while Merillat's evidence might demonstrate the employer's decisions were a "mistake," that was not enough to get past the "honest belief" rule. (15a).

The overall reasoning for the RIF construct was given as follows:

> In late 2002 and the first half of 2003, Metal Spinners experienced significant financial difficulties and decided to eliminate some positions to decrease costs—a reduction in force ("RIF"). Ms. Merillat

> and another individual, Patrick O'Beirne, were terminated on June 3, 2003. Two other individuals were terminated on June 4, 2003.[8]

Metal Spinners took the position that Wehr's hire and Merillat's termination was not a replacement. (R. 38, 393-94). Merillat responded with the evidence that her inclusion in the RIF was a pretext for the employer's real intent to replace her with the new younger male employee. CEO Wiland admitted hiring Wehr because he was unhappy with Merillat. (R. 396-97). He also acknowledged subsequent discussions with consultants about the wisdom of having "replaced" Merillat with Wehr. (R. 423). Merillat also pointed out Wiland's inexplicable alteration of titles for the same job;[9] the title for a female formerly holding the position was replaced by a new prestigious title given to the new male employee. (R. 69, 475, 482). While Metal Spinners never abandoned its reasoning that Wehr's hire, followed by Merillat's termination, was not a replacement, her former duties as the head of the metals department were exactly the same as those newly assumed by Wehr under his new title "Vice President of Metals." (*Id.*).

Merillat also submitted evidence that the short time periods and ultimate lack of change in the number of employees staffing the metals department contradicted the claim of a RIF as the true motivation for her termination. Immediately before Wehr's hire, the metals department was headed by Merillat with one subordinate employee. (R. 267-68). After Wehr was hired, within six months Merillat was terminated, leaving the metals

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8. (13a-14a). As noted prior, one of the other employees was not terminated, but instead, transferred to production, and another accepted retirement. (3a-4a).

9. In deposition, CEO Wiland was forced to admit Merillat's job was either being performed by Wehr or improvements in computer systems. (R. 413).

department staffed with exactly the same number of employees–one department head and one subordinate employee–but now *sans* Merillat.[10]

As sub-reasoning for Merillat's inclusion in the RIF, the employer claimed its decision was driven by an economic downturn. However, Metal Spinners did not explain how keeping Wehr and terminating Merillat made "economic sense" given CEO Wiland's explicit admission that it cost more to run the metals department under Wehr, compared to Merillat, because new male employee was paid $7,000.00 more in annual salary. (R. 417-18, 427-28).

The employer alleged yet another reason for including Merillat in the RIF was because "many of Ms. Merillat's tasks could be done by upgrades to the existing Vantage system, making her a *plausible* candidate for termination to cut costs." (7a, *emphasis added*). Vantage is a computer inventory tracking system that was in use by Merillat.[11] As the prior head of metals, Merillat had regularly requested that Vantage be updated so that she could operate the metals department more efficiently. CEO Wiland denied Merillat's requests, (14a, note 3, R. 454-55, 482), but after her termination, Wiland gave Wehr those same upgrades. (R. 385, 389-91, 482-83). Moreover, Wehr had *no* experience on the Vantage System pre-hire and had to be given special training to operate the system.[12] Nor did Wehr

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10. (R. 415-17). When heading the department, Merillat and Wehr respectively had access to part time clerical assistance as well as the one full time subordinate, Amy Stevenson. *Id.*

11. "Ms. Merillat tracked suppliers, shipments and inventory by using three different computer programs: Vantage, Al-Net and Excel." (2a).

12. Wehr admitted he was given special training by Metal Spinners to operate Vantage and that he had no experience with this system before being hired by Metal Spinners in December 2002. (R. 96-97).

actually implement the system upgrades, rather Metal Spinners hired an outside consultant to perform those tasks for Wehr. (R. 390-91). And while the improvements given to Wehr made his job easier, he was not correspondingly given any additional tasks, rather, he continued to perform the same job previously performed by Merillat; the only differences being that Wehr was required to do less work and paid more money. (R. 413, 466-68, 475-76, 482).

The evidence did not logically relate improvements to the Vantage System as a reason to prefer terminating Merillat. Improvements that reduced the work to manage inventory was of equal benefit to whichever employee was retained to run the metals department. However, consistent with the "honest belief" rule validating *any reason*, no matter how "trivial or foolish," the Seventh Circuit analyzed the issue as follows:

> Ms. Merillat admits that many of her tasks are now performed by the Vantage computer system and therefore, at least one of the reasons given by Metal Spinners for her termination is not pretextual.

(14a)

The employer also recycled its argument of "unsatisfactory performance" from the *prima facie* case as a "legitimate" reason for its preference to terminate Merillat. While having rejected that reasoning within the *prima facie* analysis, the Seventh Circuit came to the opposite conclusion under the "honest belief" standard for evaluating evidence of pretext.

> Even though, as noted above, Ms. Merillat's performance may have been satisfactory, it does not mean that her termination as part of a RIF was discriminatory.

(15a). Here, the Seventh Circuit did not focus on the prior evaluations of satisfactory to excellent performance as it had in

the *prima facie* case. Rather, the court highlighted one past incident where Merillat admitted not having communicated diplomatically with co-workers. And, what was not discussed by the lower court is that years before her termination, Merillat had resolved the issue, much to her employer's effusively expressed satisfaction. In comments under for "teamwork" for 2001, CEO Wiland had written:

> She has *devoted* herself to improving her interpersonal skills and has done a *very good job* of establishing a positive team approach with suppliers and with co-workers.

(R. 445, *emphasis added*). And the comments continued under "work habits:" "Jan has made *tremendous improvement* in developing rapport with coworkers. . . ." (R. 446, *emphasis added*). Similarly under "overall assessment:" "Jan has made *tremendous progress* with areas previously noted for improvement." (R. 446, *emphasis added*). Again, in 2002, on the same issue CEO Wiland wrote:

> Jan demonstrates continued improvement in this area [teamwork] and she has done a good job of establishing a positive team approach with suppliers and with co-workers.

(12a, *emphasis and comment added*). Similarly on the critical function of inventory control for 2002, CEO Wiland noted under "Quality:" "Jan did an outstanding job of reducing raw materials inventories in 2002, although further reductions are achievable." (R. 447). And, under "productivity:" "Jan is very knowledgeable and she must focus on effectively communicating this knowledge throughout the production process. . . ."

Merillat consistently argued before both lower courts that the *pre-termination* evaluations, *pre-termination* merit raises, and *pre-termination* praise for performance were in glaring

contrast to Metal Spinners' unreasonable *post-litigation* claims that she was failing in job performance. Moreover, the employer's post-suit reason of poor performance was directly contradicted by the contemporaneous admissions of the decision-maker:

> . . . Ms. Merillat maintains that Wiland told her that her termination was not because of her job performance, and Wiland admitted in his deposition that it was "possible" that he told her that.

(16a, note 5, *emphasis added*). However, in applying the honest belief rule, the Seventh Circuit concluded:

> In a RIF, it is not pretextual to terminate an individual perceived to be a weak performer in an organization even if that individual's performance could also be characterized as satisfactory or adequate.

(17a).

The employer claimed as yet another reason for her termination that: "[Merillat] had less desirable education and experience than Wehr and Wehr was more willing and better able to implement new strategies." (14a). Both lower courts credited the employer's claim as irrefutably honest, despite objective evidence that Wehr was not more skilled and was failing in the position.

> Ms. Merillat attempts to counter these differences in education and experience by claiming that Wehr actually performed poorly at his job and had to be taught various skills by Ms. Merillat. However, such inadequacies by Wehr do not negate the fact that he has a different educational background and had different experiences from Ms. Merillat; therefore, he might well have been regarded as offering more potential to the company.

(16a, note 4).

> She nevertheless contends that Wehr has done a poor job because he has had inventory sitting idle for longer periods than she did when she was doing the metals purchasing. Ms. Merillat submits that Wehr's comparatively weaker performance demonstrates that Wiland was biased against her when he decided to terminate Ms. Merillat but to leave Wehr in his position.

(14a). And while the Seventh Circuit noted that Wehr had prior experience with "new computer systems for metals purchasing" *those systems were not the Vantage system used by Metal Spinners*. Wehr had no prior experience with Vantage; the employer had to provide him with special training, and special support staff just to utilize the system, contrasted with Merillat who had previous experience operating the metals department with Vantage (*albeit*, without the support and upgrades given Wehr). (R. 96-97, 385, 389-91, 482-83).

Curiously, when noting Wehr's perceived "superior" experience with other former employers, the Seventh Circuit stated by comparison that Merillat had "no experience in the metal industry prior to working for Metal Spinners" (16a, note 4), seemingly finding no meaning in *Merillat's nineteen (19) years of experience in the metal industry with this exact employer*. (*See*, 2a, noting Merillat began her employment with Metal Spinners in 1983). Nor in this context did the Seventh Circuit address that for several years before Wehr was hired, Merillat had been heading Metal Spinners' metals department. (2a, R. 479).

Compared to Merillat's 19 years experience in the metals industry, and documented praise for her knowledge and skills operating the metals department,[13] the evidence demonstrated

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13. *See*, discussion of Merillat's prior evaluations, *supra*, pp. 5-6, 10.

Wehr lacked suitable experience peculiar to this employer's business. Merillat was instructed by CEO Wiland to teach Wehr the aspects of her job. (R. 469, 442). While Merillat was training Wehr she learned that he knew nothing about the specialized metal spinning trade and it was apparent he did not have sufficient skills to run the department. (R. 465, 481). Nor was Merillat the only one holding this opinion; CEO Wiland admitted receiving a complaint from another colleague who was "not sure [Wehr] knows what he's doing." (R. 433). That Wehr "did not know what he was doing" was backed up by substantial objective evidence.

Internal records from the metals department documented Wehr's failing performance, but when faced with that evidence CEO Wiland continued to see "superior" qualities in Wehr. For example, CEO Wiland claimed (incorrectly) that Wehr was responsible for setting up the strategic relationships with metal suppliers. (R. 436). When pressed, of the five suppliers Wiland was able to name, he was forced to admit that Merillat set up the relationships with four. (R. 436-38).

CEO Wiland also wanted to reduce the number of metal suppliers. (R. 474). Merillat reduced them to 13 by the time of her termination, (*Id.*), but under Wehr this strategic planning goal deteriorated. (R. 475).

CEO Wiland also, at first, refused to acknowledge the objective documentation of Merillat's strong performance compared to Wehr's weak performance in the critical strategic planning of inventory control measured by the "turns rate." A low turns rate is undesirable because it means more raw inventory must be on hand to meet production. (R. 419). A lower rate results from the metals department ordering in quantities that exceed production needs or failing to effectively schedule shipments. (*Id.*) The ultimate negative net effect of a low turns rate is increased cost to the company. (*Id.*) An inventory with a

turns rate of 25 costs twice the capital investment to maintain compared to an inventory with a turns rate of 50. (*Id.*)

While Merillat was running the metals department, Wiland repeatedly emphasized the importance of the turns rate. (R. 484). The turns rate was a component of her performance as the department head and the turns rate is now a component of Wehr's performance. (R. 425-26, 432-33). Under Wehr the turns rate steadily deteriorated, but Wiland at first denied he knew this to be true. (R. 420). However, Wiland later admitted he "generally" knew that the turns rate under Merillat had been 52.3 and under Wehr turns had deteriorated to below 20. (R. 424-25). This decrease of 260% efficiency in turns directly relates to an increased cost of 260% to maintain same inventory necessary for production. (R. 483-84).

Yet, Wiland insisted Wehr's performance in running the metals department was better than Merillat's. (R. 418). Wiland even claimed Wehr's better abilities would be reflected in Wehr's first evaluation compared to the last evaluation of Merillat running the department. (R. 418, 429-30). This proved not to be true. Rather, Merillat's scores edged Wehr out (*note*: lower numbers indicate higher performance). Merillat's last performance rating running the metals department scored a 72, while Wehr's first available evaluation scored a 75. (R. 445-46, 449-50).

Wiland's views of Merillat as a relatively weak performer compared to Wehr were shown to be erroneous when looking at the objective evidence. While the Seventh Circuit acknowledged the evidence demonstrated Wehr might have been the weaker performer, it concluded that was not relevant to show pretext.

> Metal Spinners may have made a mistake in terminating Ms. Merillat rather than Wehr during the RIF. However, such information, even if proven

> to be true, would not be relevant to our present inquiry. Our only task is to determine whether Metal Spinners "honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless."
>
> * * *
>
> Even if Metal Spinners' decision was, in retrospect, a mistake, that conclusion, made with the benefit of hindsight, does not mean that Metal Spinners honestly did not believe that retaining Wehr and terminating Ms. Merillat was the appropriate decision at the time it was made.

(14a-15a).

Last, The Seventh Circuit ruled that the following odd exchange between Merillat and CEO Wiland could not be considered:

> Ms. Merillat had kept a cartoon posted on her bulletin board that lampooned the difference between salaries for men and women. The cartoon, which reasonably could be described as somewhat crude,[14] had been displayed on her board for over fifteen years. *On the day that Wiland told Ms. Merillat that Wehr had been hired, he asked her to take the cartoon down.*

(3a, *emphasis added*). While Merillat believes this incident, *in light of its timing and surrounding events*, was a window into CEO Wiland's underlying prejudices, the Seventh Circuit disagreed:

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14. (R. 464). The cartoon showed a little boy and girl looking down in their diapers with the caption "oh, so this is the difference in our salaries." No images of body parts were visible.

> We have said, however, that isolated comments that are no more than "stray remarks" in the workplace are insufficient to establish that a particular decision was motivated by discriminatory animus.

(17a-18a).

E. Conclusion Of The Seventh Circuit Affirming Summary Judgment On Pretext.

> [A]lthough Ms. Merillat has demonstrated disputed material facts sufficient to prevent summary judgment for failure to meet her *prima facie* burden, Metal Spinners has proffered legitimate, non-discriminatory reasons to support her termination; in response, Ms. Merillat has not produced evidence sufficient to create a triable issue of fact with respect to her burden of demonstrating that those reasons are pretextual. Accordingly, we affirm the district court's grant of summary judgment in favor of Metal Spinners on Ms. Merillat's age and sex discrimination claims.

(18a).

REASONS FOR GRANTING THE PETITION

I. Certiorari Is Appropriate To Decide Whether The Honest Belief Rule Is The Proper Standard To Evaluate Evidence Of Pretext In Title VII And ADEA Claims Under The *McDonnell Douglas* Burden Shifting Test.

A. The Honest Belief Rule Is In Conflict With Statements Of This Court And It Strikes The Wrong Balance Between The Role Of The Reviewing Court On Summary Judgment And The Finder-Of-Fact At Trial.

1. Introduction: The Honest Belief Rule May Erroneously Validate "Honest" Preferences Based On Illegal Criteria.

Under the "honest belief" rule, evidence that an employer's reasoning for preferential treatment was unreasonable or erroneous will not support a genuine issue of material fact on the issue of pretext. (14a-15a; *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 693 (7th Cir. 2006)).

> Our only task is to determine whether [the employer] 'honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.'

(Id.). Merillat is mindful that it is her ultimate burden to persuade a jury that the employer's true reason was discrimination. However, the 'honest belief" rule is an erroneous standard for purposes of summary judgment and strikes the wrong balance between the functions of the reviewing court and the ultimate function of the fact-finder at trial.[15]

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15. Petitioner believes that in a correct balance, a reviewing court would apply an objective "reasonable employer" standard on summary judgment, while a jury would decide whether to believe the employer made an "honest" mistake (and find no discrimination), or instead, draw an inference of discrimination based on the logic that employers do not normally make "foolish trivial or baseless" business decisions.

The Seventh Circuit's formulation of the honest belief rule is a defense that allows "foolish, trivial or baseless" reasoning to conclusively defeat a plaintiff's claim of pretext. Because the honest belief rule disavows any reference to what a reasonable employer would do, then, the employer's defense becomes virtually impenetrable. In the absence of an objective standard, the "honest belief" rule is a method for evaluating pre-text that may often have a serious disconnect with reality.[16] For example, the CEO of a company may "honestly" believe women have unsuitable temperaments for executive positions. As a result, the CEO may criticize a female executive for being overly demanding of subordinates, while a male executive exhibiting the same trait will be viewed as a bold leader. The CEO will "honestly" believe that the male has superior qualifications, but will not express that the underlying reason for his conclusion is based on an intentionally prejudiced view

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16. *See*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997, 1036 (2006)

> In a powerful series of experiments, MIT business-management professor Michael Norton and his colleagues demonstrated this effect in simulated hiring and higher education admissions decisions. They showed that subjects consistently altered the qualifications they deemed most relevant to the selection of a high-level construction manager, a stereotypically male job. [text omitted]. Either way, subjects tended to rank the criteria in a way that would justify selection of the male candidate on the grounds that he was "better qualified" than the female candidate they were rejecting. However, when subjects were forced to rank the selection criteria before seeing the candidates' resumes, gender bias in selection largely disappeared.

of women.[17] When the CEO replaces the female because of his discriminatory belief, so long as the CEO is careful not to *overtly* express his prejudiced views, the "honest belief" rule will place the underlying intentional discrimination beyond the reach of federal employment laws–even where superficial reasons given can be shown to have been objectively unreasonable or arbitrary.

McDonnell Douglas teaches that "it is abundantly clear that Title VII tolerates no [text omitted] discrimination, *subtle* or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S. Ct. 1817, 1823-24 (1973, *emphasis and editing added*). If subtle discrimination is to be eradicated, then, the "honest belief" rule should be abrogated and an employer's claimed legitimate reasons subjected to a standard that *objectively* evaluates the merits of that reasoning within the pretext stage of *McDonnell Douglas*.[18]

2. The Honest Belief Rule Conflicts With Statements Of This Court

The "honest belief" rule entitles an employer to summary judgement based on foolish, or trivial, or baseless decisions–unless the plaintiff can produce additional evidence of intentional discrimination or additional evidence (beyond foolish, trivial or baseless) that the employer knowingly engaged

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17. At this point in history, most employers are savvy enough to not openly express bigoted views about the elderly, women and minorities. In fact, the circuits have regularly acknowledged that there will rarely be direct evidence of discrimination. *See, e.g., Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599 (7th Cir. 2003).

18. "[T]he allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the *elusive* factual question of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, 101 S. Ct. 1089, 1094 n.8 (1981, *emphasis added*).

in a false scheme.[19] *See, Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984 (7th Cir. 1999). While this Court has specifically commented that it has not had the "occasion to define more precisely what standard should govern pretext claims. . . ." (*Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 126 S. Ct. 1195, 1198 (2006)), a purely subjective formulation like the "honest belief" rule is in seeming conflict with prior statements of this Court.

> The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, *although this may be probative of whether the employer's reasons are pretexts for discrimination.*

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259, 101 S. Ct. 1089, 1097 (1981, *emphasis added, citation omitted*).

> That the employer's proffered reason is *unpersuasive* . . . does not necessarily establish that the plaintiff's proffered reason of race is correct. *That remains a question for the factfinder to answer. . . .*

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 524, 113 S. Ct. 2742, 2756 (1993, *emphasis added, text omitted*).

> [W]here an [ADEA] plaintiff has made out a *prima facie* case of intentional age discrimination ... the employer can rebut this case by producing evidence that its action was based on a *reasonable* nonage factor. Thus, the RFOA [reasonable factor other than age] provision codifies a safe harbor analogous to the "legitimate, nondiscriminatory reason" (LNR) justification later recognized in Title VII suits.
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19. The "honest belief" rule is strikingly similar to the "pretext plus" rule abrogated in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000).

> [T]he RFOA provision's reference to "reasonable" factors serves only to prevent the employer from gaining the benefit of the statutory safe harbor by offering an irrational justification. *Reliance on an unreasonable nonage factor would indicate that the employer's explanation is, in fact, no more than a pretext for intentional discrimination.*

Smith v. City of Jackson, 544 U.S. 228, 252-53, 125 S. Ct. 1536, 1551-52 (2002, *concurring opinion, editing added, text and citation omitted*).[20]

B. A Split Of Authority Has Developed In The Circuits Regarding Whether The Proper Test For Evaluating Evidence Of Pretext Should Apply A Subjective Or An Objective Standard.

The "honest belief" rule was first developed by the Seventh Circuit in *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 681 (7th Cir. 1997). In *Kariotis*, the Seventh Circuit recognized that the basis for the employee's termination might have been unreasonable ("objectively speaking, [the employer's] investigation left something to be desired"), but never-the-less held there was no evidence to support a finding of pretext because it was only the employer's "honest" belief that mattered. *Id.* at 675-77

> [A]rguing about the accuracy of the employer's assessment is a distraction ... because the question is not whether the employer's reasons for a decision are 'right but whether the employer's description of its reasons is honest.'

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20. The "RFOA provision as relevant here states: "Prohibition of age discrimination. (f) *Lawful practices . . . other reasonable factors. . . .* It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited . . . where the differentiation is *based on reasonable factors* other than age." 29 U.S.C. § 623 (f)(1)(*text omitted, emphasis added*).

Id. at 677. Similarly, the Ninth, Tenth, and Eleventh Circuits will not consider evidence that an employer's reasons were objectively unreasonable. *E.g.*, *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (all that matters is "that an employer honestly believed its reason for its actions, even if its reason is 'foolish or trivial or even baseless."); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999) ("relevant inquiry is not whether [the employer's] proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons. . . .", *overruled on other grounds, Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)); *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) ("issue to be resolved is not the wisdom or accuracy of Florida's conclusion that Rojas was an unsatisfactory employee. We are not interested in whether the conclusion is a correct one, but whether it is an honest one.").

However, the First, Fourth, Sixth, Eighth, and D.C. Circuits have used more objectively based evaluations of whether an employer's reasons are worthy of credence. *E.g.*, *Zapata Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 45-46 (1st Cir. 2002) (rejecting a standard that would conclusively credit an employer's subjective belief in the honesty of its explanation); *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 853-54 (4th Cir. 2001) (mistaken reasoning could be considered on the issue of pretext regardless of the employer's claim that it was honestly held at the time); *Smith v. Chrysler*, 155 F.3d 799, 806 (6th Cir. 1998) (evidence decision was not "reasonably informed" relevant to whether an employer's reasons are worthy of credence, expressly rejecting the "honest belief" rule as formulated by the Seventh Circuit in *Kariotis*); *Ryther v. KARE 11*, 108 F.3d 832, 840 (8th Cir. 1997) (pretext may be shown by

evidence that employer's decision making process was not sound);[21] *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (pretext may be based on evidence that the employer unreasonably selects a less qualified candidate).

In *Smith* the Sixth Circuit gave explicit reasons for rejecting a subjectively based test that illustrates the importance of this Court reviewing this issue.

> We find such an abstract application of the rule to be at odds with the underlying purpose behind the Act- *i.e.*, that employment actions . . . regarding [protected classifications] be grounded on fact and not "on unfounded fear, prejudice, ignorance, or mythologies." 136 *Cong. Rec.* S 7422-03, 7437 (*daily ed.* June 6, 1990) (statement of Sen. Harkin). To the extent the Seventh Circuit's application of the "honest belief" rule credits an employer's belief without requiring that it be reasonably based on particularized facts rather than on ignorance and mythology, we reject its approach.

Smith v. Chrysler, 155 F.3d 799, 806 (6th Cir. 1998, *editing added*).

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21. The 8th Circuit in *Ryther* provides an excellent discussion of this issue.

> The ultimate concern, of course, is whether the employer gave an honest explanation of its behavior. Yet, in the nature of things, evidence that the defendant employer says it relied on later shown to be inaccurate may assist the finder of fact in determining whether the employer is giving an honest explanation of its actions. As the district court held, the jury reasonably could have found [the employer's] explanations to be "trivial" and inferred that the real reason [was age discrimination].

Ryther v. KARE 11, 108 F.3d 832, 840 (8th Cir. 1997, *editing added, citations omitted*).

Petitioner submits that this disagreement among the circuits on the appropriate standard to apply in evaluating pretext is both important and suitably matured for this Court's review.

D. The Facts Of This Case Present An Excellent Opportunity For Considering The Question Presented.

This case is uniquely suited for this Court to resolve the correct legal standard for weighing pretext evidence under *McDonnell Douglas*. If a subjective test is to be abrogated and an objective standard adopted, here, the facts are rich with evidence that the employer's reasoning was unreasonable, foolish, arbitrary or objectively wrong.[22]

The employer claimed it included Merillat in the RIF because Merillat's performance was unsatisfactory. However, objective evidence of the prior two (2) years of pre-termination evaluations universally rated Merillat satisfactory to excellent in all categories. The 2001 and 2002 evaluations also contained explicit praise for her constructive communication with co-employees and suppliers and explicit praise for her handling the critical functions of inventory control. Merillat also received a performance based pay raise prior to her termination. Moreover, this issue of alleged substandard performance was not raised by Metal Spinners until after suit was filed. By contrast, at termination, CEO Wiland told Merillat that her inclusion in the Mini-RIf had *nothing* to do with her performance.[23]

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22. Complete point citations to all facts discussed in this section are found *supra* in petitioner's *Statement of the Case*.

23. That the Seventh Circuit reached one conclusion on "satisfactory performance" in the *prima facie* case, but the opposite conclusion when examining the same evidence on pretext, highlights the inherent flaw with evaluating the first half of the *McDonnell Douglas* under an objective standard, while evaluating the second half by focusing only on the subjective beliefs of the employer.

The employer also claimed Merillat's termination was driven by a need to reduce the number of personnel (i.e., the RIF). However, before Wehr was hired, Merillat was heading the metals department with one (1) subordinate employee. Six months later Merillat was gone and Wehr was heading the metals department with one (1) subordinate employee. The decision to hire Wehr, and fire Merillat, resulted in a *null* reduction in force within the metals department (discounting the brief intervening period from Wehr's hire to Merillat's termination).

Metal Spinners also claimed that it did not hire Wehr with any intent to replace Merillat. However, a younger male employee, *new to the company*, assumed a position Merillat had previously held, and shortly thereafter, Merillat was fired. Despite this new employee being given a different title, and despite claims that his job was different, in fact, both the position and duties were exactly the same. Moreover, CEO Wiland admitted he had sought Wehr to head the metals department due to claimed dissatisfaction with Merillat, and he admitted to having had subsequent discussions with consultants in the context of having "replaced" Merillat with Wehr. Contemporaneous with these events, Merillat was ordered by CEO Wiland to take down a cartoon lampooning discriminatory pay scales for men and women at the exact same time she was being informed a new male employee had been hired to take over from her as the head of metals department; a new male employee CEO Wiland had decided to pay at a higher wage.

The employer also claimed that Merillat's inclusion in the RIF was for purely "economic" reasons. However, the numbers didn't add up. It was undisputed that it cost significantly more money to operate the metals department under Wehr, than it had cost in salary when Merillat was head of the metals department. Any *rational* purely economic cost analysis dictated the new higher paid Wehr would be the first to go–not Merillat.

Metal Spinners also claimed to terminate Merillat because some of her duties could be performed by improvements to the inventory control computer program known as "Vantage." This reasoning was a *non sequitur*. Improvements to Vantage would equally benefit whoever was retained to head the metal's department. That there would simply be improvements did not dictate any particular employee would be a superior beneficiary of those improvements. Whoever was retained to run the metals department would find their job made easier by the more efficient system.

And when it came to experience with Vantage, in any head to head comparison, Merillat was the objectively more qualified employee. Merillat had prior experience operating the Vantage System, while Wehr had *no experience* with Vantage. Wehr's skills were so lacking that he required special outside consultants to implement upgrades to the system, and required special training before he could operate any version of Vantage. More explicitly exposing the arbitrariness of Metal Spinners' reasoning, the upgrades to Vantage that were given the younger male replacement were the same upgrades regularly requested by Merillat when she was head of the metals department, and which requests were always denied.

Last, perhaps the most "elusive" area of subjective reasoning expressed by Metal Spinners was the claimed belief that Wehr had superior qualifications.

One alleged superior qualification concerned the ability to implement new inventory computer programs. Set against this claim was evidence that Wehr had no experience with the computer program actually being used by Metal Spinners; he needed special training to operate the system and needed a specially hired consultant to implement upgrades to Vantage. Merillat by contrast had experience operating the Vantage system, but had been denied any upgrades to it.

Metal Spinners also claimed Wehr's prior experience in running *other* employers' metal departments demonstrated he was "superior." However, when compared to Merillat's 19 years experience in the metals industry, years of heading this metals department, past performance ratings, past merit raises, and the employer's explicitly documented past praise for her knowledge and skills operating this metals department; any claim to prefer Wehr was objectively trivial.

This view of the evidence was further supported by Wehr's need for training *from Merillat* in all functions of this particular metals department, and her resulting observation that Wehr was not competent to handle the duties unique to this specialized metals trade. Another colleague shared that opinion, expressing doubts that Wehr "knows what he is doing." And while, these subjective opinions standing alone might be unpersuasive,[24] Wehr's performance records demonstrated he was objectively failing at core functions of running the metals department.

Merillat and her colleague's observation that Wehr lacked suitable skills could be objectively evaluated in light of Merillat's evaluations and records of performance as head of metals, against the first available similar data for Wehr.[25] In fact, the

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24. The Seventh Circuit holds that "[a]n employee's self-serving statements about [her] ability . . . are insufficient to contradict an employer's negative assessment of that ability." *Gustovich v. AT & T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992). Merillat agrees that self-serving statements, standing alone, should not be considered, but where those statements are supported by other credible evidence, then, they should be considered. Merillat also believes the "self-serving" rule should apply to the employer with equal force.

25. Because Wehr was brand new to the company, he had no pre-RIF performance records. In such a circumstance the *McDonnell Douglas* burden shifting test should have been employed in a flexible manner to allow the most recent available comparisons on either side

(Cont'd)

employer invited a comparison of Merillat's performance records against the first available for the new younger male employee. When questioned about his perception that Wehr was the comparatively stronger performer, CEO Wiland stated that his opinions had been borne out by his observations of Wehr's post-RIF performance. However, when this belief was closely examined it was discovered that CEO Wiland was erroneously crediting Wehr with core tasks actually performed by Merillat. For example, CEO Wiland attempted to credit the new younger male employee with having accomplished the "strategic planning" task of setting up certain supplier relationships–a task largely completed by Merillat prior to termination.

CEO Wiland also claimed Wehr's post-termination evaluations supported that his decision was right. Actually, the direct opposite of this "belief" was true. In Wehr's very first performance evaluation he was rated slightly inferior compared to Merillat's last evaluation as head of metals.

And when examining the critical function of inventory control (expressed in "turns") the objective data showed Wehr to be over-whelmingly less competent than Merillat by a factor of more than 260% reduced efficiency; *i.e.*, a 260% increase in cost to maintain the same metals necessary for production.

(Cont'd)

of termination. However, the Seventh Circuit would not consider the evidence that the employer might have made a "mistake" because the decision could not be evaluated with the benefit of hindsight. (15a). However, refusing to consider the earliest available objective data of *actual* performance is to make impossible the task of refuting an employer's claimed ***subjective*** preference for a new employee based on *opinion*. Merillat submits that where the retained employee is relatively new, without any established track record of performance, then, the most recent post-event performance records for the preferred employee provide reasonable data against which the employer's claimed "honest" preference can be objectively evaluated.

CEO Wiland had repeatedly emphasized the importance of inventory turns when Merillat was head of metals. When confronted with Wehr's extraordinarily poor performance, CEO Wiland at first denied he knew about it–but later was forced to admit he knew it was true. Even though knowing all along that Wehr was failing in critical tasks of inventory control, CEO Wiland stuck with the opinion that Wehr was "superior" to Merillat.

As with the employer's other claims, CEO Wiland should be free to argue he "honestly" held a perception that the young male was superior to the older female, but where an employer's "perceptions" are skewed with objective reality, it should be the function of the jury to decide whether to either: a) believe the employer's claim that the preference was not based on discrimination (even though the expressed reasons were mistaken); or, b) draw an inference of pretext and discrimination based on evidence that the employer's choices were objectively unreasonable and wrong.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 6, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-4053

JANET M. MERILLAT,

Plaintiff-Appellant,

v.

METAL SPINNERS, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 04 C 193—William C. Lee, *Judge*

ARGUED MAY 8, 2006—DECIDED DECEMBER 6, 2006

Before BAUER, RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Janet M. Merillat brought this action against her former employer, Metal Spinners, Inc., ("Metal Spinners"). She alleged age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.; sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e

et seq.; and a violation of the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d). Metal Spinners filed a motion for summary judgment; the district court granted that motion. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

Metal Spinners provides a variety of metal-forming services, including metal spinning. Olin Wiland has been its chief executive officer since 1997.

Ms. Merillat began her employment with Metal Spinners in September 1983. At all times relevant to this litigation, she worked in the materials department, which consisted of Ms. Merillat and Amy Stevenson, who initially was supervised by Ms. Merillat. Until December of 2002, Ms. Merillat's title was Purchase Manager; she then became the Senior Buyer. As the Senior Buyer, her duties included creating various reports, purchasing, entering orders, shipping, meeting with management, scheduling trucks, supervising department employees, negotiating with suppliers, evaluating suppliers and creating a plan for reducing the costs of tools. Ms. Merillat tracked suppliers, shipments and inventory by using three different computer programs: Vantage, Al-Net and Excel. Consequently, Ms. Merillat sometimes had to enter the same data into more than one computer program. Ms. Merillat admitted that some

of her computer tasks were redundant, but maintains that Metal Spinners failed to give her the computer upgrades and training that would have enabled her to create all necessary reports on only one program.

In August of 2002, Metal Spinners created a new position, "Vice President of Procurement and Materials Management," and Wiland began a search for an individual to fill this position. The duties of this position included managing the materials department employees (Ms. Merillat and Stevenson), as well as establishing strategies to reduce inventory costs and increase profitability. The successful candidate would be expected to implement a new computer system. In November, Wiland offered the position to Craig Wehr. Wehr was 38 years old when he was hired; his starting salary was $62,500. At that time, Ms. Merillat earned $49,800. Ms. Merillat helped to train Wehr after he was hired.

Ms. Merillat had kept a cartoon posted on her bulletin board that lampooned the difference between salaries for men and women. The cartoon, which reasonably could be described as somewhat crude, had been displayed on her board for over fifteen years. On the day that Wiland told Ms. Merillat that Wehr had been hired, he asked her to take the cartoon down.

In late 2002 and the first half of 2003, Metal Spinners experienced significant financial difficulties and decided to eliminate some positions to decrease costs-a reduction in force ("RIF"). Ms. Merillat and another individual, Patrick O'Beirne, were terminated on June 3, 2003. Two other individuals were terminated on June 4, 2003. One of those

individuals, John Johnson, retired. The other, Jim Cranfull, had his position eliminated, but he was allowed to return to a former position on the production floor.

On the date of her termination, Ms. Merillat was 49 years old; Wehr was 38 years old. Some of Ms. Merillat's former duties, such as creating various reports, are now performed by the Vantage computer system, following a technical upgrade by Metal Spinners; other of Ms. Merillat's tasks have been absorbed into the positions occupied by Wehr and Stevenson.

B. District Court Proceedings

In addressing the merits of Metal Spinners' summary judgment motion, the district court first observed that Ms. Merillat had offered no direct evidence of either sex or age discrimination. The court then proceeded to assess both of these claims under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The district court determined that Ms. Merillat could not establish two elements of the *McDonnell Douglas* prima facie test: that she was performing her job to her employer's reasonable expectations and that similarly situated employees outside of the protected classes were treated more favorably than she.

With regard to her work performance, the court noted that Wiland's deposition testimony was that Ms. Merillat had failed to meet his expectations because: (1) she was unable "to entertain strategic concepts and manage new projects"; (2) she was "unable to adequately supervise subordinates";

(3) she "did not get along well with her coworkers"; and (4) she was "unwilling to implement a corporate-wide computer system." R.50 at 7 (citing Wiland Dep., R.35 at 16-17). The district court also determined that Metal Spinners' evaluations of Ms. Merillat from 2000-2002 confirmed Wiland's deposition testimony. Although the evaluations contained numerical ratings that indicated that Ms. Merillat was performing satisfactorily during those years, the court credited Metal Spinners' contention that the comments on those reviews "indicate that Merillat was performing marginally at best." *Id.* at 9.

The district court further explained that:

> If Merillat had simply been fired from her job in the absence of a RIF, then she might have been able to argue that she was performing satisfactorily enough to not warrant being fired. But in this case she was not terminated for cause, but terminated due to reduction in force. This court agrees with Metal Spinners that what constitutes "satisfactory" work shifts a bit in a reduction in force case. Thus, while the record shows that Merillat was performing in the mid-range in some respects, the reviews also show that Merillat had some problems that concerned Metal Spinners enough that they were included in her evaluations. Thus, in this regard, the record supports Metal Spinners['] view that Merillat was a non-satisfactory performer.

Id.

Next, the district court examined the fourth prong of the traditional RIF *McDonnell Douglas* inquiry regarding the treatment of similarly situated employees not within the protected classes. Earlier in the opinion, the district court had noted that this circuit's precedent recognizes variations on the *McDonnell Douglas* analysis for a traditional RIF, where positions and duties are eliminated, and for what this court has called a "mini-RIF," where a discharged employee's duties are absorbed by other existing staff. *See Bellaver v. Quanex Corp.*, 200 F.3d 485, 493-95 (7th Cir.2000); *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1011-12 & n. 5 (7th Cir.2000). Specifically, the district court noted that under the modified *McDonnell Douglas* test appropriate in a "mini-RIF" situation, the fourth prong of the plaintiff's prima facie case is satisfied when the plaintiff demonstrates that her duties were absorbed by persons not in the protected class. When actually applying the *McDonnell Douglas* test, however, the district court looked to whether Ms. Merillat presented anyone similarly situated to her, an inquiry, which, as we have noted, is suited to the *McDonnell Douglas* test in a traditional RIF situation. *See Bellaver,* 200 F.3d at 494. Applying this test, the district court stated that Ms. Merillat failed to show that similarly situated, younger employees or similarly situated men were treated more favorably. *Id.* at 9. Although Ms. Merillat claimed that she and Wehr were similarly situated, the district court determined that they were not, based on its findings that Wehr was her supervisor and had more education and broader work experience than Ms. Merillat.

The district court also held that, even if Ms. Merillat had established a prima facie case, Metal Spinners had a

legitimate, non-discriminatory reason for terminating her: The company was experiencing an economic downturn. The court noted that many of Ms. Merillat's tasks now could be done by the new Vantage computer system, making her a plausible candidate for termination to cut costs. Additionally, the court stated that her poor job performance was a separate legally sufficient reason for her discharge.

Finally, the district court turned to Ms. Merillat's EPA claim in which she alleged that she was paid less than Wehr because of her gender. Relying upon *Cullen v. Indiana University Board of Trustees,* 338 F.3d 693, 698 (7th Cir.2003), the district court stated that, in order to establish a prima facie case of an EPA violation, Ms. Merillat needed to show that her job and Wehr's job required comparable skill, effort and responsibility. The court then held the jobs did not require comparable "skills" because Wehr's job required him to "supervise the department and implement new strategies to improve supplier relationships," while Ms. Merillat's did not. *Id.* at 19. The court also held that the jobs did not require equal "effort," because Wehr's added responsibilities "created more stress." *Id.* Finally, the court stated that the jobs did not require equal "responsibility," because Wehr had supervisory responsibility of the entire department, including Ms. Merillat. *Id.* Therefore, the district court held that Ms. Merillat could not establish a prima facie case of wage discrimination.

The district court further held that, if Ms. Merillat had established a prima facie case, the burden would shift to Metal Spinners to prove one of the statutory defenses, including that the unequal pay arose from a seniority system,

a merit system, or any factor other than gender. *Id.* at 19-20. The court found that Wehr had more experience and education than Ms. Merillat, and that this distinction, along with market forces, provided a reason other than sex that justified paying Wehr a higher salary. The court characterized Ms. Merillat's response to Metal Spinners' proffered non-discriminatory reasons for the pay differential as "fatally weak," finding that she merely had relied on her own testimony that she and Wehr "performed a common core of tasks." *Id.* at 21. The court, therefore, found that Ms. Merillat's EPA claim "fails as a matter of law." *Id.* at 22.

II

DISCUSSION

We review a district court's grant of summary judgment de novo, construing all facts and reasonable inferences in the light most favorable to Ms. Merillat, the nonmoving party. *Healy v. City of Chicago,* 450 F.3d 732, 738 (7th Cir.2006).

A. Age and Sex Discrimination

1. Prima Facie Case

Ms. Merillat submits that, employing the *McDonnell Douglas* framework, she has established a prima facie case of age and sex discrimination. *See McDonnell Douglas,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Although *McDonnell Douglas* itself outlined a particular four-part showing that a plaintiff must make to establish her prima facie case, we long have recognized that the test is not

inflexible and is appropriately adapted where necessary to "reflect more fairly and accurately the underlying reality of the workplace." *Bellaver,* 200 F.3d at 494. In a mini-RIF context, a situation in which the dismissed worker's duties have been absorbed by another employee rather than eliminated, we employ one such modified version of the *McDonnell Douglas* framework. *Johal v. Little Lady Foods, Inc.*, 434 F.3d 943, 946 (7th Cir.2006); *Paluck,* 221 F.3d at 1011 n. 5. This approach requires that Ms. Merillat demonstrate that: (1) she is a member of a protected class; (2) she was meeting her employer's legitimate performance expectations; (3) she suffered an adverse employment action; and (4) her duties were absorbed by employees not in the protected classes.[1] *Johal,* 434 F.3d at 946; *Michas v. Health Cost Controls of Illinois,* 209 F.3d 687, 693 (7th Cir.2000).

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1. The parties in this case presented arguments relating to the viability of any comparison group presented by Ms. Merillat to demonstrate that similarly situated individuals outside the protected class were treated more favorably than she. This showing *would be* part of a plaintiff's prima facie showing under a traditional RIF test. *See Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir.2000). In this case, however, since Ms. Merillat's duties were absorbed rather than eliminated, it is more properly evaluated under the mini-RIF test. *See Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1011 n. 5 (7th Cir.2000) (stating that the key inquiry in determining whether to apply the RIF or the mini-RIF prima facie test is not the number of individuals terminated, but whether the duties of those individuals were absorbed by existing staff or eliminated altogether).

Although *Paluck*, a mini-RIF case, uses the "similarly situated" and "treated more favorably" language, our case law clarifies that this showing is satisfied in the mini-RIF context when a plaintiff

(Cont'd)

Appendix A

Metal Spinners does not dispute that Ms. Merillat is in a protected class with respect to both her age and her sex. Both parties also agree that Ms. Merillat suffered an adverse employment action when she was terminated. We therefore shall focus on the two contested prongs: whether Ms. Merillat was meeting her employer's legitimate expectations and whether her duties were absorbed by individuals not within her protected classes.

a. meeting legitimate expectations

Ms. Merillat contends that she was meeting her employer's expectations. She invites our attention to her yearly reviews for 2001 and 2002 in which Wiland's overall rating of her performance was "Satisfactory/Good." R.44, Ex.E-F. She also points to a letter that she received in January of 2003 that notes that she had been awarded a raise in her salary and that this adjustment in salary "recognize[d her] performance during the past year." R.44, Ex.L.

(Cont'd)
demonstrates that the *duties* of the terminated worker have been absorbed by *retained* workers outside of the protected class. *See Bellaver,* 200 F.3d at 495 ("The plaintiff in a [mini-RIF] case does not need to make a showing that 'similarly situated' employees were treated better because the inference of discrimination arises from the fact that they were constructively 'replaced' by workers outside of the protected class."); *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 693 (7th Cir.2000) (same). The retention of an employee outside the protected class to perform the plaintiff's duties is nothing more than a demonstration of more favorable treatment, particularly tailored to the factual circumstances of a mini-RIF case.

Metal Spinners relies on the same reviews. It submits that the written comments on those reviews indicate that Ms. Merillat was not meeting her employer's expectations. More specifically, Wiland testified in his deposition that Ms. Merillat did not meet his expectations for the following areas: ability to entertain strategic concepts and manage new projects, willingness to accept new challenges, ability to get along with others and willingness to implement a computer system. R.35 at 9-10.

The evaluations, while providing some negative comments, seem to be largely positive. In her 2001 evaluation, Ms Merillat received an "excellent" rating in ten categories and "satisfactory/good" ratings in seventeen categories, with no categories rating below "satisfactory/good."[2] *See* R.36 at 14-15. Some comments included on the evaluations are positive, such as "Jan has made tremendous progress with areas previously noted for improvement," *id.* at 15, and, in the area of work habits, "[s]he is performing at a level commensurate with her position and she needs to continue developing personally as an effective manager," *id.* Some comments, however, are more negative, such as Ms. Merillat "may need to consider delegating additional tasks," *id.*, and she "needs to explore alternatives to her current methods and practices so cost improvements can be realized," *id.* at 14.

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2. Some examples of the various categories on the evaluation form include: "Does the team member possess and apply the skill level necessary for the job?"; "Does the team member have a good attitude?"; and "Does the team member offer suggestions as to how to improve productivity?" R.36 at 14-15.

Similarly, in her 2002 evaluation, she received one "outstanding" rating, ten "excellent" ratings and sixteen "satisfactory/good" ratings, with no category rated lower than "satisfactory/good." *Id.* at 18-19. Again, there are some positive comments, such as Ms. Merillat "demonstrates continued improvement" in teamwork, *id.* at 18, and she "did an outstanding job of reducing raw materials inventories in 2002," *id.* There are also negative comments, such as she "has too many redundant/ duplicative business practices that must be challenged," *id.*, and she must work on "developing rapport with coworkers and with improving her overall morale and demeanor," *id.* at 19.

Mr. Wiland stated in his deposition that he had attempted to make the written evaluations as fair as possible. He first admitted in his deposition testimony that he did not indicate "specifically" on these evaluations that Ms. Merillat was failing in her expectations, R.35 at 20, but later stated that "printed words [on the evaluation forms] in conjunction with [the conversation he had with Ms. Merillat while going over the forms with her] indicate that she was not fulfilling the expectations that we had for her at that position," *id.* at 23.

For her part, Ms. Merillat admitted to "getting ugly" with co-workers when they "didn't do something right," in 2001, but also stated that later she "changed." R.33 at 13-15. She contends that her job performance was largely positive and that the reason for some of her failings was that she did not get the necessary computer upgrades and training to utilize the Vantage system and eliminate some of her redundant practices.

We must conclude that, based on this record, material issues of fact certainly remain with respect to whether Ms. Merillat was meeting her employer's expectations. Her employment evaluations are, at best, inconclusive. Additionally, she did receive a raise that stated it was based, in part, on her performance. Therefore, summary judgment for Metal Spinners on this prong would be inappropriate.

b. duties absorbed by individuals outside the protected classes

There is agreement that a good deal of Ms. Merillat's responsibilities were assumed by Wehr, who is neither female nor within the protected age group. We therefore must conclude that Ms. Merillat has met this prong of the modified *McDonnell Douglas* test.

2. Pretext

If the plaintiff does establish a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the termination. *See Johal,* 434 F.3d at 946. If the defendant does articulate such reasons, the burden shifts back to the plaintiff to prove the proffered reasons were pretextual. *See id.*

In the present case, where there is a genuine issue of material fact with respect to whether Ms. Merillat was meeting expectations, Metal Spinners can prevail on its motion for summary judgment only if it can show that there remains a non-pretextual and non-discriminatory reason for her discharge. Metal Spinners offers several

nondiscriminatory reasons for terminating Ms. Merillat as part of its RIF: Many of her duties could be eliminated by the implementation of the Vantage computer system; she had a history of difficulty working with co-workers and suppliers; she had less desirable education and experience than Wehr and Wehr was more willing and better able to implement new strategies.

Ms. Merillat admits that many of her tasks are now performed by the Vantage computer system and therefore, at least one of the reasons given by Metal Spinners for her termination is not pretextual.[3] She nevertheless contends that Wehr has done a poor job because he has had inventory sitting idle for longer periods than she did when she was doing the metals purchasing. Ms. Merillat submits that Wehr's comparatively weaker performance demonstrates that Wiland was biased against her when he decided to terminate Ms. Merillat but to leave Wehr in his position. However, much of Ms. Merillat's explanation for Wehr's poor performance refers to his performance after her termination. Metal Spinners may have made a mistake in terminating Ms. Merillat rather than Wehr during the RIF. However, such information, even if proven to be true, would not be relevant to our present inquiry. Our only task is to determine whether Metal Spinners "honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or

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3. Ms. Merillat does argue that, while she was employed, she had requested that the Vantage system be upgraded to help eliminate her redundant work practices. *See* Appellant's Br. at 33. However, this does not negate the fact that the computer can now produce the reports that Ms. Merillat formerly produced, which is a fact that she admits. *See id.*

even baseless." *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984 (7th Cir.1999); *see also Balderston v. Fairbanks Morse Engine*, 328 F.3d 309, 323 (7th Cir.2003) ("[A] plaintiff must do more than demonstrate that the employer made a mistake . . . ."). Even if Metal Spinners' decision was, in retrospect, a mistake, that conclusion, made with the benefit of hindsight, does not mean that Metal Spinners honestly did not believe that retaining Wehr and terminating Ms. Merillat was the appropriate decision at the time it was made. *See Johal*, 434 F.3d at 946 (stating that, when examining a claim of pretext, "it is not our role to question the wisdom of a company's decisions on how to run its business"); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir.1998) ("An articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment.").

Ms. Merillat further submits that the district court created a new standard when it stated that "what constitutes 'satisfactory' work shifts a bit in a reduction in force case." Appellant's Br. at 25 (quoting R.50 at 9). However, when read in context, it is clear that the district court was only stating what we have already recognized: that, even if an employee would not have been fired under normal circumstances, "[i]n a reduction in force, someone has to go. It is usually the least qualified or least productive employee." *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 573 (7th Cir.1998). Even though, as noted above, Ms. Merillat's performance may have been satisfactory, it does not mean that her termination as part of a RIF was discriminatory. *See Balderston*, 328 F.3d at 324 (holding that the plaintiff did not demonstrate pretext when there was no

evidence to show that the employer "did not honestly believe [it] was dismissing a poorer performing, less suitable" employee in a RIF).[4]

Relatedly, Ms. Merillat points out that, when Wiland told her that she was terminated, he told her it was due to "the poor performance of the company and economic softening in the marketplace." Wiland Dep., R.44, Ex.D-2 at 27. He admitted in his deposition testimony that he accurately represented to her the reasons for her termination.[5] *Id.* This

4. The record certainly contains evidence that supports Wiland's judgment in this respect. Ms. Merillat had only one year of post-high school education (a legal secretary degree) while Wehr had a bachelor's degree in business administration. Additionally, Ms. Merillat had no experience in the metal industry prior to working at Metal Spinners, while Wehr had previously overseen two other metal purchasing departments, had experience with new computer systems for metals purchasing and had significant contacts in the metal industry. *See Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir.2002) (finding that employees with different qualifications and experiences were not similarly situated); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 979 (10th Cir.1996) (holding that employee without relevant degree is not similarly situated to those with relevant degrees). Ms. Merillat attempts to counter these differences in education and experience by claiming that Wehr actually performed poorly at his job and had to be taught various skills by Ms. Merillat. However, such inadequacies by Wehr do not negate the fact that he has a different educational background and had different experiences from Ms. Merillat; therefore, he might well have been regarded as offering more potential to the company.

5. In fact, Ms. Merillat maintains that Wiland told her that her termination was not because of her job performance, and Wiland admitted in his deposition that it was "possible" that he told her that. R.44, Ex.D-2 at 23.

statement is consistent with a termination under a RIF. Even if Ms. Merillat's performance was sufficiently acceptable to justify retaining her in better times, that consideration does not establish that Metal Spinners' reasons for terminating her in a RIF situation were pretextual. *See Fairchild,* 147 F.3d at 573. In a RIF, it is not pretextual to terminate an individual perceived to be a weak performer in an organization even if that individual's performance could also be characterized as satisfactory or adequate.

Next, Ms. Merillat contends that Wiland preferred to work with members of his social group and therefore chose a younger male colleague over Ms. Merillat. In support of this contention, Ms. Merillat points to the several occasions on which Wiland had lunch, drinks or dinner with Wehr, while he had never done any of the same with Ms. Merillat. However, in this context, socializing with someone who is not a member of a protected class does not demonstrate bias against those who are in a protected class. The fact that Wiland and Wehr had a more amiable social relationship is not enough to demonstrate that Wiland's reasons for terminating Ms. Merillat were pretextual and that he was actually motivated by age and/or sex discrimination. *See, e.g., Pope v. ESA Servs., Inc.,* 406 F.3d 1001, 1007-08 (8th Cir.2005) (stating that the fact that a decision-maker went to lunch with white managers does not mean that his decision not to promote a minority employee was pretextual).

Finally, Ms. Merillat points to Wiland's request that she remove the cartoon lampooning the differences between male and female salaries that she had hanging on her bulletin board. Ms. Merillat argues that this incident is relevant to show bias

toward women in the workplace. We have said, however, that isolated comments that are no more than "stray remarks" in the workplace are insufficient to establish that a particular decision was motivated by discriminatory animus. *See Cullen v. Olin Corp.*, 195 F.3d 317, 323 (7th Cir.1999). We have cautioned that this general rule may give way where particular remarks in fact support an inference that unlawful bias motivated the decision-maker, such as when those remarks are made by the decision-maker or one having input in a decision, and are made "(1) around the time of, and (2) in reference to, the adverse employment action complained of." *Hunt v. City of Markham, Illinois*, 219 F.3d 649, 652-53 (7th Cir.2000). Wiland's statement regarding the cartoon fits neither of those categories, nor does it otherwise demonstrate a bias on Wiland's part sufficient to support an inference of discriminatory animus. It is, therefore, clearly insufficient to sustain a determination that the reasons for the discharge stated by Wiland and supported by evidence were pretextual in nature.

Accordingly, we must conclude that although Ms. Merillat has demonstrated disputed material facts sufficient to prevent summary judgment for failure to meet her prima facie burden, Metal Spinners has proffered legitimate, non-discriminatory reasons to support her termination; in response, Ms. Merillat has not produced evidence sufficient to create a triable issue of fact with respect to her burden of demonstrating that those reasons are pretextual. Accordingly, we affirm the district court's grant of summary judgment in favor of Metal Spinners on Ms. Merillat's age and sex discrimination claims.

B. Equal Pay Act

1. Prima Facie Case

In order to establish a prima facie case under the EPA, Ms. Merillat must show: "(1) higher wages were paid to a male employee, (2) for equal work requiring substantially similar skill, effort and responsibilities, and (3) the work was performed under similar working conditions." *Cullen v. Indiana Univ. Bd. of Trs.*, 338 F.3d at 698 (quoting *Stopka v. Alliance of American Insurers*, 141 F.3d 681, 685 (7th Cir.1998)). The parties do not dispute the first prong. Wehr's salary was $62,500; Ms. Merillat's salary was $49,800. R.29 at 1. With respect to the third prong, Ms. Merillat and Wehr worked together in the same office, and Metal Spinners does not argue that their work was not performed under similar working conditions. Therefore, only the second prong is at issue: whether Ms. Merillat and Wehr's positions required "substantially similar skill, effort and responsibilities."

In order to determine whether or not the two jobs are equal, we look to whether the jobs have a "common core of tasks, i.e., whether a significant portion of the two jobs is identical." *Cullen v. Indiana Univ. Bd. of Trs.*, 338 F.3d at 698 (internal quotation marks omitted). Once a plaintiff establishes a "common core" of tasks, we ask whether any additional tasks make the jobs "substantially different." *Id.* When assessing job duties, each of the elements listed in the EPA (skill, effort and responsibilities) must be met individually to establish a prima facie case. *Id.; see also* 29 C.F.R. § 1620.14. We look to the actual job duties performed by each employee, not to his or her job description

or title. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1461 (7th Cir.1994).

Ms. Merillat asserts that she and Wehr had many of the same tasks, including: negotiating with suppliers, buying materials, and allocating materials for production. However, Metal Spinners submits that there are two areas in which Ms. Merillat and Wehr's job duties differed. These two differences, it asserts, make their respective jobs "substantially different" for purposes of the Equal Pay Act: (1) Wehr's responsibility for "strategic planning"; (2) Wehr's supervision of Ms. Merillat. We shall discuss each of these factors in turn.

Metal Spinners contends that part of Wehr's job duties included strategic planning, which it states required him to "implement new strategies to improve supplier relationships." Appellee's Br. at 43. Wehr also testified that his job duties included "establishing strong relationships with . . . suppliers." R.44, Ex.C-1 at 14. Ms. Merillat testified that, during the six months that she remained at Metal Spinners after the arrival of Wehr, she participated in this function because she "sat in on almost every meeting that [Wehr] had with the suppliers." R.44, Ex.H at 8. In his deposition, Wiland stated that, before Wehr was hired, Ms. Merillat was responsible for "obtaining cost effective purchasing and costing for our metals," and that she "was responsible for investigating alternative methods and practices that would improve the profitability of the company, specifically pertaining to [her responsibility in] supplier relationships." R.35 at 8. Ms. Merillat testified that, after Wehr was hired, she continued to work to reduce the number of suppliers, as

Wiland had requested. *See* R.33 at 5. She also stated that she continued to "negotiate with suppliers" after Wehr was hired. R.44, Ex.H at 20.

We believe that it is clear on the record as a whole that, with respect to strategic planning, Ms. Merillat's day-to-day duties with regard to suppliers did not change appreciably; she never assumed corporate-wide responsibility for the planning responsibilities placed on Wehr's shoulders upon his accepting the vice-presidential position at Metal Spinners. Thus, at the time his compensation was set, it was understood that he would handle significant responsibilities that had not been Ms. Merillat's. That Ms. Merillat did not see Wehr make significant contributions toward the achievement of those goals does not establish that the company's expectations with respect to Wehr's performance had changed.

Next, we turn to Wehr's supervisory duties. All parties agree that Wehr's job duties included functioning as Ms. Merillat's supervisor. *See* Wiland Dep., R.44, Ex.D-1 at 9; Merillat Dep., R.44, Ex.H at 7. Ms. Merillat also admitted, in her deposition, that Wehr had supervisory duties over the materials department employees. R.44, Ex.H at 2. She explained that Wehr, not she, had the authority to hire and fire employees, and that Stevenson would contact Wehr when she was calling in sick. *Id.* Stevenson, in her deposition, agreed that Wehr had become her direct supervisor when he was hired. R.37 at 4.

Wehr therefore had supervisory duties that Ms. Merillat did not exercise. Of course, as we have noted, not all differences in supervisory duty render two positions unequal

for purposes of the EPA. *See Fallon v. State of Illinois*, 882 F.2d 1206, 1209-10 (7th Cir.1989). Indeed, there are some indications that Wehr's supervisory duties were, in actuality, minimal. Ms. Merillat submits that, although Wehr was supposed to function as her supervisor, in reality, she worked independently, and he did not supervise her. *See* Merillat Dep., R.44, Ex.H at 7 (stating, in response to a question regarding Wehr's supervisory duties with respect to her: "I pretty much work on my own. If he had questions, he would come and ask me. I was always there on time. I didn't call in sick.").

Ms. Merillat's 2002 evaluation lends some support to her contention that she continued to have a degree of supervisory authority over Stevenson. The evaluation states that, in 2003, Ms. Merillat must pursue "management" and "leadership" skills so that she may "effectively manage others on her staff." R.36, Ex.7 at 1. This statement seems to indicate that she was charged at least with supervising some of the duties of Stevenson, the only other materials department employee. Nevertheless, it is clear that, although neither had great supervisory authority over other personnel, Wehr did have more authority than Ms. Merillat.

We conclude that the record, fairly read in its totality, leads to the conclusion that Wehr and Ms. Merillat did not have equal levels of responsibility. "Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." 29 C.F.R. § 1620.17(a). Ms. Merillat has therefore failed to establish a prima facie case under the Equal Pay Act.

2. Affirmative Defense

Assuming, *arguendo,* that Ms. Merillat has established a prima facie case, the burden would shift to Metal Spinners to establish one of four statutory defenses. *Cullen v. Indiana Univ. Bd. of Trs.,* 338 F.3d at 702. The statutory defenses occur when the rate of pay is determined "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex." 29 U.S.C. § 206(d)(1). Metal Spinners submits that the fourth defense is applicable because the difference in pay between Wehr and Ms. Merillat was based on factors "other than sex." More specifically, Metal Spinners contends that the difference in pay was based, at least in part, on the difference between Wehr's and Ms. Merillat's educational background and industry-related experiences. Wehr held a bachelor's degree in business administration; Ms. Merillat had only a one-year legal secretary degree. Wehr had previous experience in the metal industry, had previously overseen two other purchasing departments and had experience implementing computer systems in metals purchasing. Ms. Merillat had not worked in the metals industry prior to her tenure at Metal Spinners. The record reveals, therefore, that there are real differences between the two employees' experience and education. Under the EPA, differences in education and experience may be considered factors other than sex. *See Cullen v. Indiana Univ. Bd. of Trs.,* 338 F.3d at 702; *Dey,* 28 F.3d at 1462; *Stanley v. Univ. of Southern California,* 13 F.3d 1313, 1322 (9th Cir.1994) ("Employers may reward professional experience and education without violating the EPA.").

Metal Spinners also submits that Wehr's salary was determined by market forces. Mr. Wiland noted that, when he decided to create the position of Vice President of Procurement and Materials Management, he enlisted the help of a search firm and was informed that the market rate for such a position was $65,000-$75,000. Mr. Wiland also consulted trade journals to determine the appropriate market rate for such a position. We have held that an employer may take into account market forces when determining the salary of an employee. *See Cullen v. Indiana Univ. Bd. of Trs.*, 338 F.3d at 703; *Stopka v. Alliance of American Insurers*, 141 F.3d 681, 687 (7th Cir.1998) (accepting a difference in pay as based on a factor other than gender when motivated by "legitimate market forces").[6]

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6. We recognize that we must be cautious when analyzing an employer's claim that "market forces" justify a higher salary, as companies may use such a theory "to justify lower wages for female employees simply because the market might bear such wages." *Taylor v. White*, 321 F.3d 710, 718 (8th Cir.2003); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 205, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974) (finding a violation of the EPA when a company "took advantage" of a "job market in which [the employer] could pay women less than men for the same work"); *Siler-Khodr v. Univ. of Texas Health Sci.*, 261 F.3d 542, 549 (5th Cir.2001) (finding an employer's market forces argument "not tenable" when it "simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA"). The record does not support the inference that Metal Spinners took advantage of any kind of market forces that would permit different pay for a male and a female for the same position.

Metal Spinners has put forth evidence that the difference in pay was based on a factor other than sex; specifically, the difference was based on Wehr's education, his experience and the market forces at the time of his hire. Ms. Merillat has not put forth evidence to place the facts surrounding these stated rationales in dispute. Therefore, summary judgment also was appropriate based on Metal Spinners' affirmative defense of the pay differential being based on a "factor other than sex." *See* 29 U.S.C. § 206(d)(1)(iv).

Conclusion

For the forgoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION ENTERED SEPTEMBER 19, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA FORT WAYNE DIVISION

CIVIL NO. 1:04cv193

JANET M. MERILLAT,

Plaintiff,

v.

METAL SPINNERS, INC.,

Defendant.

OPINION AND ORDER

This matter is before the court on a motion for summary judgment filed by the defendant, Metal Spinners, Inc ("Metal Spinners"), on May 18, 2005. The plaintiff, Janet M. Merillat ("Merillat"), responded to the motion on July 19, 2005. Metal Spinners filed its reply on August 5, 2005.

For the following reasons, Metal Spinners' motion for summary judgment will be granted.

Appendix B

Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. *Fitzpatrick v. Catholic Bishop of Chicago,* 916 F.2d 1254, 1256 (7th Cir.1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id. In Re Matter of Wildman,* 859 F.2d 553, 557 (7th Cir.1988); *Klein v. Ryan,* 847 F.2d 368, 374 (7th Cir.1988); *Valentine v. Joliet Township High School District No. 204,* 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Juarez v. Ameritech Mobile Communications, Inc.,* 957 F.2d 317,

322 (7th Cir.1992)(quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact, *Celotex,* 477 U.S. at 323. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. *Goka v. Bobbitt,* 862 F.2d 646, 649 (7th Cir.1988); *Guenin v. Sendra Corp.,* 700 F.Supp. 973, 974 (N.D.Ind.1988); *Posey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir.), *cert. denied,* 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

So that the district court may readily determine whether genuine issues of material fact exist, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party contends no genuine issues exist. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record outlining all material facts to which the non-movant contends exist that must be litigated. *See, Waldridge v. American Hoechst Corp. et al.,* 24 F.3d 918 (7th Cir.1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of

the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson,* 477 U.S. at 249-251, 106 S.Ct. at 2511. Furthermore, in determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *Anderson,* 477 U.S. at 248. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. *Id.* The issue of fact must be genuine. Fed.R.Civ.P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586; *First National Bank of Cicero v. Lewco Securities Corp.,* 860 F.2d 1407, 1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-252. Finally, the court notes that, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained" and in such cases summary judgment is appropriate. *Mason v. Continental Illinois Nat'l Bank,* 704 F.2d 361, 367 (7th Cir.1983).

Appendix B

Discussion

Merillat is a 49 year old female who worked for Metal Spinners from 1983 through June 3, 2003. Merillat's job title was Purchase Manager until December of 2002. From December of 2002 until her termination, Merillat had the job title of Senior Buyer. Merillat's job duties as a Purchase Manager included complying with company policies; managing the purchase procurement of metals and materials, supplies, small tools, and hand tools; accounting for the previously mentioned items; issuing materials to production jobs; safe-guarding and accounting for inventory; managing the effectiveness of suppliers; overseeing the day-to-day activities as needed; managing and supervising various administrative assistants and associates; and representing Metal Spinners in a professional manner.

Olin Wiland ("Wiland") is the CEO of Metal Spinners. Wiland made the final determination to terminate Merillat. Wiland claims that he terminated Merillat because Metal Spinners was experiencing an economic downturn and Merillat's termination was a result of a reduction in force ("RIF"). In addition, Wiland states that he based his decision to terminate Merillat on the fact that he felt that her duties could be absorbed by other employees or a computer program, Vantage Computer System ("Vantage"). In addition to Merillat, the Vice President of Sales and Marketing, Patrick O'Beirne, was also terminated. O'Beirne is a male, who was under age 40 at the time of his termination.

In December 2002, approximately six months prior to Merillat's termination, Craig Wehr ("Wehr"), a male (age

38) was hired as the Vice President of Procurement and Materials Management. Wehr's jobs duties included establishing strategic relationships with metal suppliers and subsequent outside processing suppliers; supervising the day-to-day material requirements and activities of the department and employees; evaluating and documenting supplier ratings and criteria for delivery, quality, and pricing; and any other duties as assigned by Wiland. After Wehr was hired, Merillat had the job title of Senior Buyer and many of her managerial duties were given to Wehr. Wehr had a base salary of $65,000 while Merillat's salary was $49,800. Wehr also acted as Merillat's supervisor during the six months that they worked together. Metal Spinners did not subsequently hire anyone to the position of Purchasing Manager or Senior Buyer. Merillat's former job duties are now being performed by the Vantage program or other employees, including Wehr.

Merillat has sued Metal Spinners under the Age Discrimination in Employment Act ("ADEA"), alleging age discrimination, Title VII of the 1964 Civil Rights Act ("Title VII"), alleging gender discrimination and the Equal Pay Act, 29 U.S.C § 206(d) ("EPA"), alleging unequal pay based on gender.

With respect to her ADEA claim, Merillat claims that she was terminated from employment at Metal Spinners because of her age; she was 49 years-old at the time of her termination. The ADEA prohibits an employer from "discharg[ing] any individual ... because of such individual's age." *Schuster v. Lucent Technologies, Inc.* 327 F.3d 569, 573 (Ill.2003) (citing 29 U.S.C. § 623(a)(1) (2003)). To establish a claim under the ADEA, a plaintiff-employee must

show that age actually motivated the employer's decision and influenced the outcome. *Id.* (Citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). The claim may be proven through direct evidence of the employer's discriminatory motive, or through the indirect approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

To survive a motion for summary judgment, a plaintiff under ADEA does not need direct evidence, but need only raise an inference of discrimination. *Karitotis v. Navistar International Transportation Corp.*, 131 F.3d 672, 676 (7th Cir.1997). Here, Merillat does not present any direct proof that Metal Spinner's decision to terminate her position was based on age discrimination, therefore the facts must be analyzed using the *McDonnell Douglas* burden shifting test. In order to establish a *prima facie* case of age discrimination under this test, Merillat must prove she was (1) in a protected class (over the age of 40); (2) performing her job to her employer's reasonable expectations; (3) suffered an adverse employment action; and (4) that other substantially younger employees were treated more favorably than she was. *Bennington v. Caterpillar, Inc.*, 275 F, 3d 654, 659 (7th Cir.2001).

The analysis is slightly different in a RIF case, including a mini-RIF, such as this case, where only a small number of employees were terminated. When analyzing an age discrimination case under a mini-RIF, instead of proving the fourth requirement that a person outside the protected class was treated more favorably, the plaintiff must instead prove

that her duties were absorbed by persons who were not in the protected class. *Verwey v. Illinois College of Optometry,* 43 Fed.Appx. 996, 999 (Ill.2002).

In the present case, it is undisputed that Merillat was 49 years old at the time of her termination and that Metal Spinners terminated her employment. However, Metal Spinners contends that Merillat cannot prove the second and fourth elements of her *prima facie* case-that she was meeting Metal Spinners' legitimate expectations or that younger employees were treated more favorably.

With respect to the "meeting legitimate expectations" element, Wiland, Metal Spinners' Chief Executive Officer, testified that Merillat failed to meet his expectations because she was unable "to entertain strategic concepts and manage new projects," because she was unable to adequately supervise subordinates, because she was not willing "to accept new challenges," because she did not get along well with her co-workers, and because she was unwilling to implement a corporate-wide computer system. (Wiland Dep. at 16-17).

Metal Spinners claims that Merillat's contemporaneous performance evaluations confirm Wiland's testimony. Merillat's evaluation for the year 2000 suggests that she needs improvement working with others because of her "confrontational and demeaning attitude toward suppliers and coworkers". (Merillat Dep. Ex. G.) Merillat's 2000 review also demonstrates that she often "let clerical tasks impair her primary responsibilities." (Merillat Dep. Ex. G.). Finally, her 2000 review notes that she had expressed displeasure

with management's decisions to implement new software programs. (Merillat Dep. Ex. G.).

For the calendar year 2001, Merillat's review indicates that while she made improvements in the area of teamwork, she still had plenty of room for improvement in this area. (Merillat Dep. Ex. F.). In fact, Merillat's 2001 review indicates that she needed to "explore alternatives to her current methods and practices" to improve efficiency and profitability. (Merillat Dep. Ex. F.). The review further indicates that Merillat would be closely scrutinized in 2002 because her department had significant goals that had to be realized in order to be successful. (Merillat Dep. Ex. F.).

Merillat's review for the calendar year 2002 indicates that while Merillat met some of her goals, such as reducing raw-materials inventory, Merillat still needed to be more efficient. (Merillat Dep. Ex. E.). In fact, Merillat's 2002 review indicates that "she had too many redundant/duplicate business practices that must be challenged (e.g. Al-Net and certain Excel spreadsheets)" and that these practices must be eliminated. (Merillat Dep. Ex. E.). Furthermore, Merillat's 2002 review indicated that she needs continuing improvement with building rapport with co-workers and improving her demeanor. (Merillat Dep. Ex. E.).

Metal Spinners argues that Merillat's reviews all comport with Wiland's testimony that Merillat was not meeting his expectations because she refused to make required changes and eliminate redundant practices. Metal Spinners also claims that Merillat's own testimony confirms the comments on the review. Merillat admitted that she had difficulties with co-

workers and suppliers. (Merillat Dep. at 59). Merillat also admitted that she did not agree with Wiland's decisions about relationships with suppliers and that certain of her practices were redundant. (Merillat Dep. at 40, 44, 60). Metal Spinners concludes that Merillat's resistance to change during its troubled times was unacceptable and thus Merillat cannot establish that she was meeting legitimate expectations.

In response, Merillat points out that in her evaluations in 2001 and 2002, Wiland scored Merillat as "3" (on a scale of 1 to 5), which correlated with "Satisfactory/Good; consistently meets requirements and expectations". Further, Merillat states that Wiland's comments on the evaluations were communicated to her as "goals to strive for" and not as areas of failure. (Merillat Aff. at ¶ 21).

Metal Spinners concedes that the numerical ratings on Merillat's reviews for 2001 and 2002 indicates that she was performing satisfactorily, but contends that the comments on Merillat's reviews for these years indicate that Merillat was performing marginally at best. Metal Spinners argues that when a company is faced with having to reduce its number of employees, the company's legitimate expectations change somewhat because the company must attempt to do the same amount of work with less people. Therefore, an employee whose performance is marginal and whose job functions can be easily absorbed by others or performed by a computer may be a good candidate for termination.

Looking at the record as a whole, the court finds that Merillat has failed to raise an inference that she was performing her job satisfactorily in the context of a reduction

in force. If Merillat had simply been fired from her job in the absence of a RIF, then she might have been able to argue that she was performing satisfactorily enough to not warrant being fired. But in this case she was not terminated for cause, but terminated due to reduction in force. This court agrees with Metal Spinners that what constitutes "satisfactory" work shifts a bit in a reduction in force case. Thus, while the record shows that Merillat was performing in the mid-range in some respects, the reviews also show that Merillat had some problems that concerned Metal Spinners enough that they were included in her evaluations. Thus, in this regard, the record supports Metal Spinners view that Merillat was a non-satisfactory performer.

Metal Spinners next claims that Merillat also cannot establish the fourth element of her *prima facie* case-that similarly situated, younger employees were treated more favorably. Metal Spinners points out that as part of the reduction in force, Patrick O'Beirne, Metal Spinners' Vice President of Sales and Marketing, was also terminated, and his position was eliminated. O'Beirne is a male, who was under the age of 40 at the time of his termination. Metal Spinners concludes that of the two office positions eliminated during the reduction in force, one employee was under 40 and the other over 40, and thus there is no evidence that any younger employees were treated more favorably than Merillat.

Merillat does not discuss O'Beirne in her response but, rather, takes the position that she and Wehr are similarly situated and that Wehr was treated more favorably. However, as Metal Spinners makes clear, Wehr and Merillat are not

similarly situated. First, Wehr was Merillat's supervisor. Second, Wehr had more education and broader experience than Merillat, and the record shows that Wiland considered these factors in making his decision about which positions should be eliminated. Additionally, Merillat had a history of job performance problems, including an inability to get along with co-workers and resistance to change.

The Seventh Circuit Court of Appeals has admonished plaintiffs that they have a high hurdle to jump in order to demonstrate that other employees are similarly situated. "[A] plaintiff must show that there is someone who is directly comparable to her in all material respects." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir.2002). In making this determination, courts look at a number of factors. In certain cases, it is relevant" 'whether the employees had comparable experience, education and qualifications,' provided that the employer took these factors into account when making the personnel decision in question." *Id.* Courts have also considered employees' previous job performance problems in determining whether employees are similarly situated. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618-19 (7th Cir.2000).

This court agrees that Merillat has failed to show that she was similarly situated to Wehr and that Merillat has failed to make any showing that a similarly situated person was treated more favorably. Thus Merillat has failed to establish a *prima facie* case.

Even if Merillat could establish a *prima facie* case of age discrimination, the burden would shift to Metal Spinners

to show a legitimate, non-discriminatory reason for the adverse employment action. *Conteras v. Suncast Corp.*, 275 F.3d 756, 760 (7th Cir.2001). If Metal Spinners meets this burden, then the burden shifts back to Merillat to prove by a preponderance of the evidence that Metal Spinners' reason is merely pretext for discrimination. *Id.*

A plaintiff can prove pretext either by presenting direct evidence that a discriminatory reason motivated the employer's decision or by presenting evidence that the employer's proffered reason is unworthy of credence, thus raising the inference that the real reason is discriminatory. *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304, 1310 (7th Cir.1997). The standard requires that the employer not merely be mistaken in its judgment, but inquires whether the employer honestly believed its proffered reason for the discharge. *Id.*

In the present case, Metal Spinners claims that it terminated Merillat's position because it was experiencing an economic downturn, which is a legitimate, non-discriminatory reason for discrimination. The record shows that Metal Spinners had experienced operating losses during the last half of 2002 and the first half of 2003. In order to improve the bottom line, Metal Spinners determined that it needed to make some significant changes, including some restructuring to help reduce costs. After deciding that it needed to make some cutbacks, Metal Spinners reviewed the company structure to determine which positions could be eliminated. (Wiland Dep. at 93-94). According to Metal Spinners, Merillat was chosen in part because many of her duties could be eliminated with the implementation of the

company-wide Vantage computer system. Metal Spinners also points out that Wiland determined that Merillat was not meeting his expectations because of her unwillingness to implement the company-wide Vantage system and her inability to entertain strategic concepts. Merillat also had a history of disagreements with her co-workers, and when deciding whom to terminate, Wiland considered Merillat's continued inability to take on supervisory roles and her inability to get along with co-workers. (Wiland Dep. at 93). It is clear that these are all legitimate, non-discriminatory reasons for Merillat's discharge.

The burden then shifts back to Merillat to prove that these stated reasons were pretext for discrimination. Pretext may be proven "directly with evidence that [an] employer was more likely than not motivated by a discriminatory reason, or indirectly by evidence that the employer's explanation is not credible." *Schuster v. Lucent Technologies, Inc.* 327 F.3d 569, 574 (citing *Wade v. Lerner New York, Inc.*, 243 F.3d at 323 (7th Cir.2001) (quotation omitted)). A plaintiff-employee may proceed indirectly by attempting to show that the employer's "ostensible justification is unworthy of credence" through evidence "tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge." *Schuster v. Lucent Technologies, Inc.* 327 F.3d at 575 (citing *Testerman v. EDS Tech. Prods. Corp.*, 98 F.3d 297, 303 (7th Cir.1996) (quotations omitted)).

To avoid summary judgment, a plaintiff must do more than allege that the defendant is lying about its real reasons

for termination. The plaintiff must point to specific facts sufficient to cast doubt on the defendant's proffered reasons. *See Schuster v. Lucent Tech., Inc.*, 327 F.3d 569, 578 (7th Cir.2003). Courts are to examine "whether the employer gave an honest explanation of its behavior. In other words, if [the defendant] honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless, [the plaintiff] cannot prevail." *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984 (7th Cir.1999)(internal quotations and citations omitted). Furthermore, a plaintiff must present facts "to rebut each and every legitimate, non-discriminatory reason advanced by the [defendant] in order to survive summary judgment." *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1007 (7th Cir.2001). In cases where the plaintiff was eliminated as part of a reduction in force, the plaintiff may demonstrate pretext in two ways: (1) showing that the entire reduction in force was pretext for discrimination or (2) showing that the reasons for including the plaintiff in the reduction were pretext. *See Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1012-13 (7th Cir.2000).

Metal Spinners argues that Merillat cannot establish that its economically motivated reduction in force was merely pretext for age discrimination. First, Metal Spinners' financial information conclusively proves that Metal Spinners was experiencing a net loss during the first two calendar quarters of 2003. Merillat has not made any showing whatsoever that these numbers are pretext. Furthermore, the other person that was eliminated as part of the reduction in force was O'Beirne, who was under age 40.

Appendix B

As Metal Spinners notes, because Merillat cannot prove that the reduction in force was pretext for discrimination, she must demonstrate that Metal Spinners' reasons for including her in the reduction in force were pretext. Metal Spinners states that it chose to eliminate Merillat's position for three reasons: (1) Wehr had more desirable skills, education, and experience than Merillat and was more willing to implement new strategies; (2) many of Merillat's duties could be eliminated by the implementation of the Vantage system; and (3) Merillat had a history of difficulties in working with co-workers. Metal Spinners states that it chose to keep Wehr and eliminate Merillat because Wiland believed that Wehr had better potential to fulfill the new strategic goals of the company, including strategic relationships with suppliers. Merillat even admitted that she thought Wehr was hired primarily to engage in strategic planning. (Merillat Dep. at 63). Furthermore, Merillat had been very resistant to making the changes that Wiland felt were necessary for Metal Spinners' success. In fact, Merillat testified that she thought Wiland's insistence on changing the relationships with suppliers was "not the right way to go". (Merillat Dep. at 41). Merillat was also resistant to switching to the Vantage system. Instead, she continued to do redundant data entry into two software programs in order to get reports that she wanted to assist her with her purchasing duties. (Merillat Dep. at 57-62). When Merillat was terminated, many of her duties were eliminated by the Vantage compute system. (Wehr Dep. at 43-65). According to Metal Spinners, many spreadsheets and reports that Merillat created manually were done by inputting all the raw data into Vantage and designing a report to tabulate the raw data in a user-friendly format. Wehr began this process in August 2003, thus eliminating

the need for the redundancies created by Merillat. Finally, Merillat had a history of being difficult with other employees. In fact, Merillat admitted that she was brusque with others and that she sometimes got overly excited and upset. (Merillat Dep. at 59). Moreover, in her annual performance reviews, Wiland noted that she needed to improve in this area, and even when she demonstrated improvement, he noted that there was more room for improvement in this area. (Merillat Dep. Exs. E, F, and G).

In response to Metal Spinners' arguments and evidence, Merillat merely argues that Wiland's decision was incorrect. Merillat compares the performance of the metals department under her supervision with the performance of the metals department under Wehr's supervision, and concludes that Wehr did a poor job and cost the company money. However, as Metal Spinners notes in reply, these comparisons are all irrelevant and do not prove that Wiland's decision was discriminatory. At most, they suggest that Wiland's decision may have been erroneous. The law is clear that Wiland's decision need not be the best decision, and it need not turn out to be correct. Courts only examine "whether the employer gave an honest explanation of its behavior. In other words, if [Wiland] honestly believed in the nondiscriminatory reasons [he] offered, even if the reasons are foolish or trivial or even baseless, [Merillat] cannot prevail." *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984 (7th Cir.1999)(internal quotations and citations omitted). Courts do not sit as super-personnel departments and are not to second-guess the decisions of employers. *See Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir.1997).

Appendix B

This court agrees with Metal Spinners that by focusing on the wrong legal standard, Merillat has failed to demonstrate that Metal Spinners' legitimate, non-discriminatory reasons are pretext. As noted, in order to prove pretext, a plaintiff must present facts "to rebut each and every legitimate, non-discriminatory reason advanced by the [defendant] in order to survive summary judgment." *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1007 (7th Cir.2001). Accordingly, Merillat's ADEA claim fails for this additional reason.

Metal Spinners next argues that Merillat cannot prove her gender discrimination claim. It is clear that Merillat does not have any direct evidence of gender discrimination. Merillat admitted that Wiland never made any comments about her gender. (Merillat Dep. at 81). At most, Merillat claims that Wiland made her remove a cartoon that she had pinned to her bulletin board. The cartoon depicted two babies—one female and one male—looking into their diapers, and the cartoon stated, "Oh, so this is the difference in our salaries." Merillat claims that Wiland asked her to remove this cartoon from her workstation at approximately the time Wehr was hired. This court agrees with Metal Spinners that although Wiland was the decision-maker with respect to Merillat's termination, this single event can hardly be evidence of gender discrimination. As Metal Spinners notes, Wiland had a duty to ensure that the workplace remained free from hostile or discriminatory remarks. Thus, asking an employee to remove a cartoon, which could be construed as hostile towards men, can hardly evidence gender discrimination. Furthermore, the incident occurred at least six months prior to the decision to terminate Merillat. There

is simply no temporal connection between the incident and Wiland's decision to terminate Merillat.

Metal Spinners next argues that Merillat cannot establish a *prima facie* case of gender discrimination. As with a claim of age discrimination, the *prima facie* case is altered slightly for plaintiffs who were terminated as part of a reduction in force, and a gender-discrimination plaintiff must establish: (1) she is a member of a protected class; (2) she was meeting her employer's legitimate expectations; (3) she was discharged; and (4) similarly situated male employees were treated more favorably. *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 693 (7th Cir.2000). Metal Spinners concedes that Merillat is a woman and that Metal Spinners terminated her employment. However, Metal Spinners claims that Merillat cannot establish the second and fourth element of her *prima facie* case—that she was meeting Metal Spinners' legitimate expectations or that similarly situated men were treated more favorably.

As discussed above, Merillat was not meeting the legitimate expectations of Metal Spinners. (Wiland Dep. at 16-17). Additionally, Merillat cannot establish that similarly situated men were treated more favorably. Although Merillat contends that Wehr was similarly situated to her, this simply is not the case. Wehr served as Merillat's supervisor while Wehr reported directly to Wiland. Furthermore, Wehr had duties other than the basic purchasing duties performed by Merillat. For example, Wehr was responsible for making strategic changes to the department, including establishing new strategic relationships with suppliers. Moreover, as part of a reduction in force, O'Beirne's job was also eliminated.

Thus, it is clear that Merillat cannot point to any similarly situated men who were treated more favorably than she was treated. In any event, as set forth above, even if Merillat could establish a *prima facie* case of gender discrimination, Metal Spinners has articulated legitimate, non-discriminatory reasons for Merillat's termination, and Merillat cannot establish that such reasons were pretext. Accordingly, summary judgment will be granted in favor of Metal Spinners on Merillat's Title VII claim.

The court will next turn to Merillat's claim that she was paid less than Wehr because of her gender. In order to establish a *prima facie* case of wage discrimination under the EPA, Merillat must prove: (1) she was paid less than a male employee; (2) for equal work requiring substantially similar skill, effort, and responsibilities, and (3) the work was performed under similar working conditions. *Cullen v. Indiana Univ. Bd. of Tr.*, 338 F.3d 693, 698 (7th Cir.2003). Assuming that Merillat could meet this burden, the burden then shifts to Metal Spinners to show that the pay differential arises from a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any other factor other than gender. *Wollenburg v. Comtech Mfg. Co.*, 201 F.3d 973, 976 (7th Cir.2000).

Metal Spinners acknowledges that it is undisputed that Merillat was paid less than Wehr, and that their work was performed under similar working conditions. However, Metal Spinners argues that Merillat cannot establish that she did equal work or that her work required substantially similar skill, effort, and responsibility. "In determining whether two jobs are equal, the crucial inquiry is 'whether the jobs to be

compared have a 'common core' of tasks, i.e., whether a significant portion of the two jobs is identical.' Once the plaintiff establishes a common core, the court must ask whether any additional tasks make the jobs 'substantially different" '. *Cullen,* 338 F.3d at 698 (internal citations omitted).

Metal Spinners acknowledges that Wehr and Merillat did perform a number of similar tasks, including most of the purchasing department duties. However, Metal Spinners argues that two facts differentiate Wehr's job from Merillat's job. First, Wehr was charged with much more management responsibility than Merillat. In fact, states Metal Spinners, that was the exact reason that Wehr was hired-to perform management duties that Merillat was reluctant or unable to tackle. Metal Spinners argues that these duties are "additional tasks" making Wehr's job "substantially different" from Merillat's job. *Id.* More specifically, Wehr was the supervisor of the purchasing department, and all employees, including Merillat, reported to Wehr. Second, Wehr played a vital role in changing Metal Spinners' supplier relationships. As such, Wehr was charged with creating strategic relationships with suppliers in an effort to reduce the cost of metals and reduce the amount of inventory or working capital invested into the metals.

The EPA requires courts to examine three separate elements when comparing jobs: skill, effort, and responsibility. "Each of these elements must be met individually to establish a prima facie case." *Cullen,* 338 F.3d at 698. Under the EPA, skill includes factors such as "experience, training, education, and ability." *Id.* At this

point, however, courts look not at the individuals, but at the positions. In this case, Wehr's position as Vice President of Procurement and Materials Management required more ability than Merillat's position as Senior Buyer because Wehr was required to supervise the department and to implement new strategies to improve supplier relationships. *Id.*

The court must then look at whether the positions required equal effort. "Job factors which cause mental fatigue and stress . . . are to be considered in determining the effort required by the job." 29 C.F.R. § 1620.16(a). In this case, Wehr's position as Vice President of Procurement and Materials Management required more effort. Although Wehr and Merillat were both office employees, Wehr's additional responsibilities and the ultimate responsibility for the materials department created more stress. Finally, the court must consider whether Wehr's position and Merillat's position have equal responsibility. "Responsibility is concerned with the degree of accountability required in the performance of the job." 29 C.F.R. § 1620.17(a). The record shows that when Wehr was hired as the Vice President of Procurement and Materials Management, he was charged with supervisory responsibility for the entire department, including Merillat. As the Vice President, Wehr had ultimate responsibility for the success or failure of the department. Because Merillat has not established that she did equal work which required equal skill, effort, or responsibility, Merillat cannot establish a *prima facie* case under the Equal Pay Act.

Even if Merillat could establish a *prima facie* case, that would not be the end of the issue. Rather, if a plaintiff establishes a *prima facie* case under the EPA, the burden

then shifts to the defendant to prove that the pay disparity arises from a seniority system, a merit system, a system that measures earnings by production, or any factor other than gender. *Wollenburg*, 201 F.3d at 976. Metal Spinners sets forth three reasons for the pay disparity between Merillat and Wehr: Wehr's experience, Wehr's education, and market forces.

"Even if a man and woman are doing the same work for different pay, there is no violation if the wage difference stems from a factor other than sex. Experience is a nondiscriminatory reason for wage disparity." *Id.* Prior to joining Metal Spinners, Merillat worked as a legal secretary. (Merillat Dep. Ex. A.). When she was hired at Metal Spinners in 1983, Merillat was hired in the purchasing department although she had no prior experience in purchasing. Wehr began his career in purchasing in 1988. Although Wehr had fewer total years of experience than Merillat in purchasing, Wehr had a wider variety of experiences, requiring more skill and responsibility. For example, Wehr had previously been the supervisor of at least two purchasing departments with several individuals reporting directly to him. (Wehr Dep. at 94-95). Wehr also had experience implementing new computer systems in the purchasing area. (Wehr Dep. at 94-95). Wehr also had experience in a number of different metal industries, allowing him to compare and explore new methods within the metal-spinning industry. Thus, argues Metal Spinners, Wehr's experience was more significant in that he had many years of supervisory responsibility and had experience with implementation of new materials and purchasing software.

Appendix B

Metal Spinners also states that it paid Wehr more than Merillat because he had more education, and education is "a relevant consideration in determining whether disparate salaries exist for reasons other than sex." *Cullen,* 338 F.3d at 702. Merillat's education consisted of an associate's degree in the form of a "legal secretarial degree," which she earned from the Columbus Business University in 1972. (Merillat Dep. Ex. A). Merillat also took three courses at IPFW in the 1980s, two in purchasing and one in supervision. (Merillat Dep. at 14). Wehr, in contrast, had a bachelor's degree in business administration from Indiana University. Metal Spinners claims that Wehr's degree is clearly relevant to his job as Vice President of Procurement and Materials Management in that it gives him an overall familiarity with accounting, financial forecasting, and other factors relevant to purchasing raw materials.

Lastly, Metal Spinners argues that the pay disparity between Wehr and Merillat is justified by the market forces that existed when Wehr was hired. *Id.* When Wiland decided to create the position of Vice President of Procurement and Materials Management, he enlisted the help of a search firm. The firm told Wiland that the going rate for such a position was approximately $65,000-$75,000. (Wiland Aff. at ¶ 9). Furthermore, Wiland consulted trade journals to seek guidance in setting a salary for the new position, which indicated that Wehr's starting salary was at the lower end of the scale for similar positions. (Wiland Aff. at ¶ 9). Metal Spinners contends that relying on these factors is permissible, and they demonstrate that Wiland had legitimate, non-discriminatory reasons for paying Wehr more than Merillat.

Appendix B

Merillat's response is fatally weak. Merillat merely cites to her own testimony, where she asserts that she and Wehr performed a common core of tasks. Merillat fails to address the issue of whether Wehr performed any additional tasks that made his job substantially different from her job. *Cullen v. Indiana Univ. Bd. of Tr.*, 338 F.3d 693, 698 (7th Cir.2003)(courts must first determine whether jobs have a common core of tasks and then determine if any additional tasks make the jobs substantially different). In the present case, Metal Spinners has documented that Wehr performed additional tasks which made his job substantially different from Merillat's job. Additionally, Metal Spinners has documented three reasons for the pay disparity between Merillat and Wehr: Wehr's experience, Wehr's education, and market forces. Consequently, as Metal Spinners has articulated legitimate reasons (other than gender) for the pay disparity, Merillat's EPA claim fails as a matter of law.

Conclusion

Based on the foregoing, Metal Spinners' motion for summary judgment is hereby GRANTED.

Entered: September 19, 2005.

s/ William C. Lee
William C. Lee, Judge
United States District Court

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No. 06-1223

In the Supreme Court of the United States

JANET M. MERILLAT,

Petitioner,

v.

METAL SPINNERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Once an employer has articulated a legitimate, non-discriminatory reason for eliminating an employee's position as part of a reduction in force, the employee can avoid summary judgment only by providing evidence that the employer's reason was pretextual.

Can an employee avoid summary judgment when she has presented no evidence creating a genuine issue whether the employer lacked an honest belief in its proffered nondiscriminatory reason or that the employer's honest belief was unreasonable?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent Metal Spinners, Inc.'s parent company is Metal Spinners Holdings, Inc., an Indiana corporation. No publicly held company owns stock in Metal Spinners, Inc.

TABLE OF CONTENTS

COUNTER STATEMENT OF THE QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

Background 1

Proceedings Below 2

Perceived Misstatements 7

REASONS TO DENY THE WRIT 9

I. No Split Among the Circuits Justifies Certiorari . . . 9

A. The Seventh Circuit's "Honest Belief" Rule Is in the Mainstream 9

B. The Sixth Circuit's Approach Does Not Differ In Substance from the Seventh Circuit's "Honest Belief" Test 12

C. The Seventh Circuit's Standard Is in Harmony with Other Circuits 14

II. The Seventh Circuit's Standard Comports with this Court's Case Law 19

III. This Case Does Not Present an Appropriate Opportunity to Analyze Pretext 20

A. Any Difference Between the Circuits' Standards Would Not Affect the Outcome of this Case . . . 20

B. The Reduction-in-Force Context Makes this a Poor Case to Address Pretext 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Abramson v. William Paterson Coll. of New Jersey,
260 F.3d 265 (3d Cir. 2001) 18

Aka v. Wash. Hosp. Ctr.,
156 F.3d 1284 (D.C. Cir. 1998) 24

Azimi v. Jordan's Meats, Inc.,
456 F.3d 228 (1st Cir. 2006), *cert. denied*,
127 S.Ct. 1831 (2007) 16

Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.,
328 F.3d 309 (7th Cir. 2003) 10, 21

Bender v. Hecht's Dep't Stores,
455 F.3d 612 (6th Cir. 2006), *cert. denied*,
2007 WL 514828 (Apr. 23, 2007) . . . . . *passim*

Bullington v. United Airlines, Inc.,
186 F.3d 1301 (10th Cir. 1999) 24

Byrnie v. Town of Cromwell Bd. of Educ.,
243 F.3d 93 (2d Cir. 2001) 18

Cichon v. Exelon Generation Co.,
401 F.3d 803 (7th Cir. 2005) 22

Coleman v. Quaker Oats Co.,
232 F.3d 1271 (9th Cir. 2000) 17

Dorsch v. L.B. Foster Co.,
782 F.2d 1421 (7th Cir. 1986) 19

E.E.O.C. v. Sears Roebuck & Co.,
243 F.3d 846 (4th Cir. 2001) 24

E.E.O.C. v. Target Corp.,
460 F.3d 946 (7th Cir. 2006) 11, 14

Fairchild v. Forma Scientific, Inc.,
147 F.3d 567 (7th Cir. 1998) 3

Fischbach v. District of Columbia Dep't of Corr.,
86 F.3d 1180 (D.C. Cir. 1996) 16, 17, 22

Flores v. Preferred Technical Group,
182 F.3d 512 (7th Cir. 1999) 11, 13

Godfredson v. Hess & Clark, Inc.,
173 F.3d 365 (6th Cir. 1999) 25

Hux v. City of Newport News, Va.,
451 F.3d 311 (4th Cir. 2006) 16

Johnson v. AT&T Corp.,
422 F.3d 756 (8th Cir. 2005) 15, 16

Kariotis v. Navistar Int'l Transp. Corp.,
131 F.3d 672 (7th Cir. 1997) . . . . . *passim*

Little v. Illinois Dep't of Revenue,
369 F.3d 1007 (7th Cir. 2004) 11, 13

Lowe v. Alabama Power Co.,
244 F.3d 1305 (11th Cir. 2001) 17

Majewski v. Automatic Data Processing, Inc.,
274 F.3d 1106 (6th Cir. 2001) 22

Manning v. Chevron Chem. Co.,
332 F.3d 874 (5th Cir. 2003) 18

Marcano-Rivera v. Pueblo Int'l, Inc.,
232 F.3d 245 (1st Cir. 2000) 26

McCoy v. WGN Cont'l Broad. Co.,
957 F.2d 368 (7th Cir. 1992) 10, 11

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) . . . . . *passim*

O'Bryan v. KTIV Television,
64 F.3d 1188 (8th Cir. 1995) 22

Paluck v. Gooding Rubber Co.,
221 F.3d 1003 (7th Cir. 2000) 25

Pippin v. Burlington Res. Oil & Gas Co.,
440 F.3d 1186 (10th Cir. 2006) 22, 25, 26

Pollard v. Rea Magnet Wire Co.,
824 F.2d 557 (7th Cir. 1987) 10

Rojas v. Florida,
285 F.3d 1339 (11th Cir. 2002) 24

Ryther v. KARE 11,
108 F.3d 832 (8th Cir. 1997) 15, 24

Schuster v. Lucent Tech., Inc.,
327 F.3d 569 (7th Cir. 2003) 26

Smith v. Chrysler Corp.,
155 F.3d 799 (6th Cir. 1998) . . . . . *passim*

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 19

Texas Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 19

Thanongsinh v. Bd. of Educ.,
462 F.3d 762 (7th Cir. 2006) 11

Tyler v. RE/MAX Mountain States, Inc.,
232 F.3d 808 (10th Cir. 2000) 17, 22

Villiarimo v. Aloha Island Air, Inc.,
281 F.3d 1054 (9th Cir. 2002) 12, 24

Wexler v. White's Fine Furniture, Inc.,
317 F.3d 564 (6th Cir. 2003) 14

Zapata-Matos v. Reckitt & Colman, Inc.,
277 F.3d 40 (1st Cir. 2002) 24

Rules

Sup. Ct. R. 15.1 7

Sup. Ct. R. 10(a) 9

STATEMENT OF THE CASE

Background

Metal Spinners, Inc. is a manufacturing business with a facility in Angola, Indiana, that performs metalwork, including metal spinning, which consists of forming sheet metal blanks into circular parts such as cones and cylinders. App. 2a.[1]

Janet Merillat began work at Metal Spinners in 1983 as purchase manager and later worked as senior buyer. App. 2a, 30a. She had one year of post-college secretarial training, and all of her relevant experience arises from her 19 years as an employee of Metal Spinners. App. 16a n.4.

In 2002, Metal Spinners hired Craig Wehr to fill the newly created position of vice president of procurement and materials management. App. 3a. Wehr had a business degree from Indiana University, and he had several years of experience as a purchasing manager in the metals industry. App. 16a n.4. He had experience and contacts in varied types of metal manufacturing, and he supervised installation of a new computer system for one past employer. App. 16a, 23a. He was younger than Merillat and was paid about twelve thousand dollars per year more than Merillat. App. 3a, 4a.

In 2002 and 2003, Metal Spinners experienced financial difficulties. App. 3a. The company's board approved a reduction-in-force to save money. App. 3a-4a; C.A.

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[1] References to the appendix in the petition are noted as "App. _a." References to Metal Spinners' appendix in the Court of Appeals are noted as "C.A. App. _."

App. 234. Merillat and three other employees were terminated. App. 3a. The other three employees terminated were males, and one was younger than 40. App. 3a-4a, 30a.[2]

Since the reduction in force, some of Merillat's duties have been taken over by Wehr and another employee. App. 4a. Other of her former duties now are carried out by a computer system called Vantage. *Id.*

Proceedings Below

Merillat sued Metal Spinners, alleging gender and age discrimination.[3] App. 31a. The District Court granted summary judgment to Metal Spinners. It ruled that Merillat was unable to show any direct proof of discrimination or to make out a *prima facie* case based on indirect evidence using the method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). App. 32a, 37a. The District Court further ruled that she failed on two parts of the *McDonnell Douglas* test because she did not show (1) that she was meeting her employer's reasonable expectations or (2) that similarly situated employees outside the protected classes were treated more favorably. App. 33a-36a.

With regard to her performance, the District Court recognized that in a reduction-in-force, some employees must be terminated, including employees whose performance

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[2] One of the four ultimately accepted a demotion rather than termination.

[3] Merillat also alleged violations of the Equal Pay Act. Those claims were also resolved by summary judgment in favor of Metal Spinners. The Equal Pay Act claims are not raised in Merillat's petition for certiorari and are not discussed in this opposition.

otherwise would be deemed adequate. App. 36a. In other words, shortcomings that might ordinarily cause no adverse consequences might support termination during a reduction-in-force. "In a reduction in force, someone has to go." *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 573 (7th Cir. 1998).

As an alternative holding after determining that Merillat failed to establish a *prima facie* case, the District Court looked at whether Merillat could show that Metal Spinners' proffered reasons for eliminating her position were pretextual. App. 39a. The court stated that, in the reduction-in-force context, Merillat could meet her burden by showing that the entire reduction-in-force was pretextual or that the reasons for eliminating her position were pretextual. App. 40a.

The District Court determined that the reduction-in-force was not itself pretextual based on unrebutted evidence of Metal Spinners' financial problems and uncontradicted testimony that the company chose to eliminate certain positions to achieve financial stability. App. 38a-39a. It then set forth Metal Spinners' reasons for choosing to eliminate Merillat's position: "(1) Wehr had more desirable skills, education, and experience than Merillat and was more willing to implement new strategies; (2) many of Merillat's duties could be eliminated by the implementation of the Vantage system; and (3) Merillat had a history of difficulties in working with co-workers." App. 41a.[4]

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[4] The District Court elaborated that Metal Spinners preferred Wehr because he had better potential to fulfill the company's strategic goals, while "Merillat had been very resistant to making the changes that Wiland [the CEO] felt were necessary for Metal Spinners' success." App. 41a. Also, Merillat was "resistant to switching to the Vantage system. Instead, she continued to do

As to these proffered reasons, the District Court stated that Merillat could prove pretext directly by showing that the employer was motivated by a discriminatory reason "or indirectly by evidence that the employer's explanation is not credible" because "the proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge." App. 39a (internal quotation omitted).

The District Court concluded that Merillat's response to these legitimate, nondiscriminatory reasons was off-target. Merillat tried to show that the employer made a bad decision because Wehr did not do a very good job after she left. App. 42a. But Merillat's approach did not meet her burden to address the *credibility* of Metal Spinners' reasons for eliminating her job. The role of the courts is not to second-guess sincere business decisions. *Id.* Merillat made no effort to show that Metal Spinners' reasons were pretextual. *Id.* She failed to address the correct standard and therefore failed to prove pretext.

The Seventh Circuit affirmed summary judgment for Metal Spinners, but on a different analysis. The Seventh Circuit found that Merillat might be able to prove a *prima facie* case because there were genuine issues as to whether Merillat's performance met her employer's expectations, despite her employer's statements that her performance was not satisfactory. App. 13a. It also found that she met that part of the *McDonnell Douglas* test requiring her to show that others similarly situated were treated more favorably – as

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redundant data entry into two software programs in order to get reports that she wanted to assist her with her purchasing duties." *Id.*

modified to address reductions-in-force – because some of her job functions were absorbed by employees outside the protected class. *Id.* Metal Spinners therefore could not obtain summary judgment on its theory that Merillat failed to make a *prima facie* case. *Id.*

But the Seventh Circuit agreed that Merillat failed to show that Metal Spinners' proffered reasons for terminating her in the reduction-in-force were pretextual. App. 14a. The court stated:

> Metal Spinners offers several nondiscriminatory reasons for terminating Ms. Merillat as part of its RIF: Many of her duties could be eliminated by the implementation of the Vantage computer system; she had a history of difficulty working with co-workers and suppliers; she had less desirable education and experience than Wehr and Wehr was more willing and better able to implement new strategies.
>
> Ms. Merillat admits that many of her tasks are now performed by the Vantage computer system and therefore, at least one of the reasons given by Metal Spinners for her termination is not pretextual.

App. 13a-14a.

The Seventh Circuit then addressed Merillat's argument that Wehr rather than Merillat should have been terminated in the reduction-in-force because his performance was worse than hers and his salary was higher than hers. App. 14a. Like the District Court, the Seventh Circuit reasoned that it could not properly address Merillat's arguments about Wehr's performance problems because, to the extent Merillat even showed performance problems, all of her evidence arose from

the time period *after* she was terminated. App. 14a-15a. The Seventh Circuit concluded that it could not engage in such retrospective analysis because those facts were not available to the employer at the time of the reduction-in-force. App. 15a.

Also like the District Court, the Seventh Circuit then looked at whether Metal Spinners' reasons for terminating Merillat were honest. "Even if Metal Spinners' decision was, in retrospect, a mistake, that conclusion, made with the benefit of hindsight, does not mean that Metal Spinners honestly did not believe that retaining Wehr and terminating Ms. Merillat was the appropriate decision at the time it was made." App. 15a. The court concluded that Merillat had provided no evidence that Metal Spinners did not honestly believe that the decision to terminate Merillat and retain Wehr was the right decision at the time it was made. *Id.*

The Seventh Circuit further concluded that the District Court applied the correct standard for a reduction-in-force case: "Even if Ms. Merillat's performance was sufficiently acceptable to justify retaining her in better times, that consideration does not establish that Metal Spinners' reasons for terminating her in a RIF situation were pretextual." App. 17a. Even if her performance would be deemed satisfactory in other situations, she failed to show that Metal Spinners did not honestly believe she was a poor performer in the reduction-in-force context. *Id.* She therefore failed to show pretext that would defeat Metal Spinners' proffered non-discriminatory reasons for terminating her. App. 17a-18a.

Perceived Misstatements

As required by Supreme Court Rule 15.1, Metal Spinners notes instances in which Merillat has not fully or accurately represented record evidence.

Merillat's characterization that her termination was not part of a proper reduction in force is unsupported by any record evidence. She refers to the "alleged RIF" and argues that her termination could not have been economically motivated because Metal Spinners would have saved more money by terminating Wehr than by terminating Merillat. Pet. at 3-4, 8. But the evidence in the record of Metal Spinners' reduction-in-force was uncontradicted. Metal Spinners provided a financial statement showing that it lost money six months in a row in 2003. C.A. App. 252. Metal Spinners' CEO discussed a reduction-in-force with the company's board and decided to terminate four individuals. App. 3a-4a, 36a; C.A. App. 234.

Obviously in a reduction-in-force the mostly highly paid employees are not always terminated. Rather, businesses make decisions to eliminate positions based on many factors. In this case, Merillat's position was a likely candidate for elimination because many of her tasks could be performed by a computer system, she had less desirable education and experience than Wehr, and she had a history of problems, including her admitted inability to get along with co-workers. App. 14a, 38a-39a.

Also, Merillat's pervasively repeated statements that her job duties were "exactly the same" or constituted "the same job" done by Wehr are not correct and contradict the conclusions of both courts below. *See, e.g.*, Pet. at 3, 7, 9. Both the District Court and Court of Appeals concluded that

Wehr had more responsibilities than Merillat. The Court of Appeals concluded that Wehr had corporation-wide strategic planning responsibilities and supervisory duties (including supervision of Merillat) that Merillat did not have. App. 20a-22a. The District Court had come to similar conclusions. App. 47a. These conclusions are contradicted by nothing other than Merillat's own subjective statements. C.A. App. 120-21, 163-65, 313, 400, 452, 457-58.

Additionally, Merillat's characterization that Wehr's performance was inferior to hers relies on hindsight and irrelevant evidence and ignores evidence of Merillat's own shortcomings, such as her admitted history of problems getting along with co-workers. Pet. at 11-15. She derides Wehr's experience with other metal companies in comparison to hers at Metal Spinners, pet. at 12, but his contacts with other metal companies were an important factor in his hiring, App. 16a n.4. She argues that inventory sat longer on Wehr's watch, pet. at 12, but the company's CEO president testified that he did not use inventory turns as a management tool and was not concerned with it, C.A. App. 420. She assails a slight increase in the number of metal suppliers under Wehr's management, pet. at 13, but the CEO testified that this trivial growth was untroubling and Wehr improved supplier relationships, C.A. App. 275, 435. She argues that despite Wehr's superior education and experience, her know-how should have been the factor the employer preferred, an argument that asks the courts to substitute their judgment for the employer's. Pet. at 11. Indeed, this whole section of her statement of the case is an argument that the courts should engage in a retrospective evaluation of Metal Spinners' management decisions.

REASONS TO DENY THE WRIT

I. No Split Among the Circuits Justifies Certiorari.

To the extent the circuits diverge on the degree to which an employer's honest belief must be objectively reasonable to constitute a defense in a Title VII case, that divergence is minor, likely to decrease as decisional law develops, and insufficient to justify certiorari under Supreme Court Rule 10(a). Merillat's portrayal of a serious circuit split is overblown and relies on cherry-picked authority rather than mainstream case law. The circuits in fact approach the issue of pretext in employment discrimination in fundamentally the same fashion.[5]

A. The Seventh Circuit's "Honest Belief" Rule Is in the Mainstream.

The Seventh Circuit has long applied an "honest belief" rule, which Petitioner characterizes as the issue in this case. The rule applies after an employment discrimination plaintiff has made a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and the employer has articulated one or more "legitimate, nondiscriminatory" reasons for taking the disputed employment action. *Id.* at 802. The "honest belief" rule requires the plaintiff to show that the employer did not honestly believe its articulated reasons and such reasons are merely a pretext for unlawful discrimination.

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[5] Merillat, of course, does not believe that any circuit's standard is appropriate. Rather, she advocates a wholly new "reasonable employer" standard that no court has applied. Pet. at 17 n.15.

No circuit requires the employer's "legitimate, nondiscriminatory" reason to be factually correct, so long as the employer reasonably relied on it at the time. The rationale for this approach is apparent – to do otherwise would require courts to factually probe and second-guess reasonable business judgments of the sort employers engage in every day, making the courts into the "super-personnel department" they are not intended to be. *See, e.g., Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 324 (7th Cir. 2003) (court does not sit as a "super-personnel department"); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627 (6th Cir. 2006), *cert. denied*, 2007 WL 514828 (Apr. 23, 2007) (same).

The Seventh Circuit uses the "honest belief" rule, which it crystallized in *McCoy v. WGN Continental Broadcasting Company*, 957 F.2d 368, 373 (7th Cir. 1992), to judge an employer's stated rationale.[6] In *McCoy*, the employer articulated non-discriminatory reasons for terminating McCoy, and McCoy claimed that the reasons were so implausible as to be pretextual. *Id.* The court stated that "our inquiry is limited to 'whether the employer gave an honest explanation of its behavior.'" *Id.* (quoting *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987)). It explained that "the issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the

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[6] The Petitioner states incorrectly in her Petition at 21 that "the 'honest belief' rule was first developed by the Seventh Circuit in *Kariotis v. Navistar International Transportation Corporation*, 131 F.3d 672 (7th Cir. 1997)." The Seventh Circuit actually first developed its "honest belief" approach in earlier cases such as *McCoy* and *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987).

employer honestly believes in the reasons it offers." *Id.* The Seventh Circuit has employed this approach in many later cases.

Despite this language, however, the Seventh Circuit's approach does not unquestioningly accept the employer's proffered reasons. Rather, the test explores the reasonableness of the employer's professed belief. "[A] determination of whether a belief is honest is often conflated with analysis of reasonableness." *Flores v. Preferred Technical Group*, 182 F.3d 512, 516 (7th Cir. 1999). The Seventh Circuit has stated that "the more objectively *un*reasonable a belief is, the more likely it will seem that the decisionmaker did *not* actually hold it." *Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1013 (7th Cir. 2004) (emphasis in original).

Recent Seventh Circuit cases show that, in practice, the Seventh Circuit will analyze the objective facts surrounding an employer's decision and, when the facts and circumstances indicate that the employer's belief is not honestly held, will rule in the employee's favor. *See, e.g., E.E.O.C. v. Target Corp.*, 460 F.3d 946, 960-61 (7th Cir. 2006) (analyzing whether Target's decision not to hire an African American applicant was honestly justified and holding that objective evidence indicated that there was a material issue of fact as to whether Target's non-discriminatory reason was honestly held); *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 780-82 (7th Cir. 2006) (analyzing whether an employer honestly believed the reasons given for its adverse employment action and holding that the employee had created a triable issue of fact regarding pretext based on the objective evidence).

Merillat's effort to show a circuit split is colored by what may be the Seventh Circuit's rhetorical excess in describing

its approach. Merillat repeats no fewer than eight times in her petition (including in the question presented) a quotation or paraphrase from *Kariotis v. Navistar International Transportation Corporation*, 131 F.3d 672, 676 (7th Cir. 1997): "Moreover, if the company honestly believed in those reasons, the plaintiff loses even if the reasons are foolish or trivial or baseless." The Seventh Circuit has repeated this phrasing in several other cases, and the Ninth Circuit has also used it. *See, e.g., Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). This pithy idiom may appear overly deferential to employers, but the Seventh Circuit's decisions, such as those described in the preceding paragraph, show that the court does not simply accept without examination whatever reasons an employer may give for an employment action.

B. The Sixth Circuit's Approach Does Not Differ in Substance from the Seventh Circuit's "Honest Belief" Test.

Contrary to Merillat's depiction, the Sixth Circuit's approach does not differ substantively from the Seventh Circuit's approach. The Sixth Circuit has stated that "[t]o the extent the Seventh Circuit's application of the 'honest belief' rule credits an employer's belief without requiring that it be reasonably based on particularized facts rather than on ignorance and mythology, we reject its approach." *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). Further, "in order for an employer's proffered non-discriminatory basis for its employment action to be considered honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Id.* at 807. The court went on to say: "If the employer is unable to produce such evidence to support its employment action, then the 'honest belief' rule

does not apply. Even if the employer is able to make such a showing, the protection afforded by the rule is not automatic." *Id.*

Like the Seventh Circuit, however, the Sixth Circuit does not require perfection: "we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Id.* The Seventh Circuit has stated that its approach to pretext is not identical to the Sixth Circuit's approach. *See Little*, 369 F.3d at 1012 n.3 (7th Cir. 2004) (declining to adopt the Sixth Circuit's approach to pretext); *Flores*, 182 F.3d at 516 (same).

But these decisions express differences in nuance, not a stark departure in approach. When analyzing whether the plaintiff has offered evidence showing pretext, both the Sixth and Seventh Circuits (and other circuits) focus their inquiry on whether the employee has shown that the employer's proffered reasons for its employment decision are not honestly held and reasonably based. *See, e.g., Smith*, 155 F.3d at 806 (employee must demonstrate that employer's reasons are not true); *Kariotis*, 131 F.3d at 676 (same). Even in the cases where the Seventh Circuit states disagreement with the Sixth Circuit, the Seventh Circuit acknowledges that reasonableness does play an important role in its analysis of pretext, and there is little practical difference in the two circuits' approaches to pretext. *Compare Flores*, 182 F.3d at 516 ("the more objectively reasonable a belief it, the more likely it will seem that the belief was honestly held") *with Smith*, 155 F.3d at 807 (analyzing "whether the employer made a reasonably informed and considered decision before taking an adverse employment action").

Moreover, when a plaintiff tries to prove pretext indirectly, the two circuits require plaintiffs to demonstrate pretext in nearly identical ways. In the Sixth Circuit, "The Plaintiffs can demonstrate pretext 'by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the Defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'" *Bender*, 455 F.3d at 624 (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003)). The Seventh Circuit looks for almost exactly the same three things: "An applicant can raise a genuine issue of material fact about an employer's credibility by presenting evidence that the employer's explanation was [1] contrary to the facts, [2] insufficient to justify the action or [3] not truly the employer's motivation." *Target Corp.*, 460 F.3d at 960 (bracketed numbering added). Thus, despite different wording to describe their approaches, both the Sixth Circuit and Seventh Circuit approach pretext in largely the same manner.

C. The Seventh Circuit's Standard Is in Harmony with Other Circuits.

Also contrary to Merillat's representation, the circuits do not divide neatly into camps that apply the Seventh Circuit's standard or the Sixth Circuit's standard. This state of affairs is not surprising because, as shown above, the two standards are stated somewhat differently but in fact are very similar in their application and generally dictate the same outcome. It is also unsurprising that there is some variation in the way the standard for pretext is stated in the circuits, if for no other reason than the sheer number of employment discrimination

cases the courts address.[7] Faced with the myriad of facts and circumstances in these thousands of cases (such as the reduction-in-force circumstance in this case), it is no wonder that the courts' statements of the standards they apply sometimes diverge a bit.

The difference among the circuits Merillat tries to portray is overblown. For example, her claim that the First, Fourth, Eighth and D.C. Circuits take the same approach as the Sixth Circuit and use "more objectively based evaluations of whether an employer's reasons are worthy of credence" is not accurate. Pet. at 22. The very Eighth Circuit case she cites as following an "objective" approach, *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), actually considers whether the employer honestly believed its explanation of its conduct toward an employee, looking at the facts and circumstances surrounding that belief. *Id.* at 840. It stated that "[t]he *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior." *Id.* (emphasis in original).

A more recent case also confirms that the Eighth Circuit does not follow what Merillat describes as an "objective" test: "Contrary to [the employee's] assertion, the proper inquiry *is not* whether [the employer] was factually correct in determining that [the employee] had made the bomb threats. Rather, the proper inquiry is whether [the employer] honestly

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[7] In one recent year, for example, the federal courts of appeal received 2,212 new appeals in private party employment discrimination cases. Administrative Office of the U.S. Courts, Federal Caseload Statistics Table B-7 ("Nature of Suit or Offense in Cases Arising from the U.S. District Courts, by Circuit, During the 12-month Period Ending March 31, 2006") (2006) http://www.uscourts.gov/caseload2006/tables/B07Mar06.pdf.

believed that [the employee] had made the bomb threats." *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005) (emphasis in original). The Court added that "even if [the employer] had no solid proof that [the employee] made the bomb threats, and even if [the employer] was mistaken in its belief that [the employee] had made the threats, any such mistake does not automatically prove that [the employer] was instead motivated by unlawful discrimination." *Id.* at 762-63.

Likewise, the First, Fourth and D.C. Circuits also do not apply a strictly objective approach to pretext that mirrors the Sixth Circuit's approach. For instance, in *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 246 (1st Cir. 2006), *cert. denied*, 127 S.Ct. 1831 (2007), the First Circuit emphasized that, when evaluating pretext, the Court must focus on "the perception of the decisionmaker" and "whether the employer believed its stated reason to be credible," but also noted that the employer's "good faith belief is not automatically conclusive" and the plaintiff may "elucidate specific facts" that show that the employer's justification is a "sham." *Id.* The Fourth Circuit has recognized that courts should defer to the employer's business judgment, but plaintiffs may amass enough evidence that "undermines the credibility of the employer's stated reasons." *Hux v. City of Newport News, Va.*, 451 F.3d 311, 315 (4th Cir. 2006). Similarly, in *Fischbach v. District of Columbia Department of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996), the Court emphasized that, when reviewing pretext, the Court should focus on "whether the employer honestly believes in the reasons it offers," but noted that evidence indicating that the employer made "an error too obvious to be unintentional" is relevant to the question of whether the employer's stated reason is a pretext for discrimination. *Id.* at 1183. Thus, the First, Fourth, Eighth, and D.C. Circuits place substantial weight on the

employer's subjective business judgment, but acknowledge that plaintiffs can show pretext through objective evidence.

Nor is Merillat's description accurate that the Ninth, Tenth and Eleventh Circuits follow the Seventh Circuit and "will not consider evidence that an employer's reasons were objectively unreasonable." Pet. at 22. For example, in *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808 (10th Cir. 2000), the Tenth Circuit reviewed pretext in a race discrimination case and stated that, although the court would not sit as a super-personnel department and review employment decisions with hindsight, "[e]vidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question of whether its stated reason is a pretext masking prohibited discrimination." *Id.* at 814 (quoting *Fischbach*, 86 F.3d at 1183). *See also Lowe v. Alabama Power Co.*, 244 F.3d 1305, 1308 (11th Cir. 2001) (favorably citing *Smith v. Chrysler* and stating that "the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action"); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282-85 (9th Cir. 2000) (emphasizing that plaintiff must challenge the "veracity of the reasons" given by the employer to establish pretext and evaluating in detail the objective evidence presented by plaintiff in support of the claim of pretext).

This brief exposition shows that any divergence among the circuits is neither clear, consistent, nor widespread. Rather than falling on either side of a sharp dividing line, the circuits recognize both the importance of an employer's honest belief in its reason for taking an employment action and the reasonable basis for that honest belief.

The Second, Third and Fifth Circuits, which Merillat did not discuss, further exemplify this approach. In *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93, 105 (2d Cir. 2001), the Second Circuit analyzed an age and gender discrimination claim and stated that if "an employer's explanation, offered in clear and specific terms, is reasonably attributable to an honest even though partially subjective evaluation of . . . qualifications, no inference of discrimination can be drawn." *Id.* at 105 (internal quotation omitted). But a plaintiff can establish pretext by attacking the employer's credibility with objective evidence. *Id.* at 105-06.

Likewise, as the Third Circuit wrote in *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 283 (3d Cir. 2001), "it is not enough for a plaintiff to show that the employer's decision was wrong or mistaken, because the issue is whether the employer acted with discriminatory animus." Thus, the courts may use objective facts to analyze the reasonableness of an employer's belief. "[T]o make a sufficient showing of pretext [the plaintiff] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the employer's] reasons that a reasonable fact finder *could* rationally find them unworthy of credence." *Id.* (emphasis in original; internal quotation marks omitted). The Fifth Circuit appears to also give deference to the employer's subjective belief underlying its employment decision while permitting the plaintiff to point to objective evidence indicating that the belief is implausible or otherwise not worthy of credence. *See, e.g., Manning v. Chevron Chem. Co.*, 332 F.3d 874, 881-82 (5th Cir. 2003). This blend of "honest belief" and objective evidence is applied by all circuits, generally including (despite its overheated rhetoric) the Seventh.

II. The Seventh Circuit's Standard Comports with this Court's Case Law.

Contrary to Merillat's characterization, the Seventh Circuit's honest belief rule also follows this Court's holdings. As to pretext, the "employer's burden is satisfied if he simply explains what he has done or produc[es] evidence of legitimate nondiscriminatory reasons." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (internal quotation omitted). *Burdine* held that the lower court had improperly "placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." *Id.* The Seventh Circuit's honest belief rule follows this Court's approach and mirrors the parties' proper burdens. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523-4 (1993) ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race.").

The Seventh Circuit's honest belief rule evaluates the honesty of the employer's belief in its legitimate nondiscriminatory reason and thus is in harmony with *McDonnell Douglas*. The honest belief rule recognizes that what is at issue is the employer's intent, not the correctness of the employer's business judgment or acumen. *See Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1426 (7th Cir. 1986) ("It is not the court's duty to determine the validity of the defendant's business decision as long as the decision was made in good faith."); *Kariotis*, 131 F.3d at 677 ("[A]n opportunity for rebuttal is not an invitation to criticize the employer's evaluation process or simply to question its conclusion about the quality of an employee's performance....

[B]ecause the question is not whether the employer's reasons for a decision are right but whether the employer's description of its reasons is honest.") (internal quotation omitted).

To successfully oppose summary judgment under *McDonnell Douglas*, the employee must rebut the honesty of the employer's reason or point to evidence indicating discrimination. The employee may not challenge the wisdom of his employer's business decisions or judgment. Thus, a court appraises whether the employee proves that the employer's belief was dishonest. The honest belief rule implements this appraisal consistent with *McDonnell Douglas*.

III. This Case Does Not Present an Appropriate Opportunity to Analyze Pretext.

A. Any Difference Between the Circuits' Standards Would Not Affect the Outcome of this Case.

Merillat incorrectly asserts in her petition that some circuits, when analyzing pretext, look solely at the honesty of the employer's subjective belief and do not consider the objective evidence surrounding the reasonableness of the employer's belief. Pet. at 21-22. Metal Spinners showed in the previous section of this Brief in Opposition that all circuits actually overlay their "honest belief" inquiry with a reasonableness analysis. Thus, any difference among the circuits is more rhetorical than real.

But assuming there *is* variation among the circuits as to analysis of an employer's honest belief, this case would come to the same result no matter which circuit's standard were applied. In this case, the employer's honest belief that Merillat's position should be eliminated in the reduction-in-force was reasonably held, and Merillat designated no

evidence to controvert the employer's reasoning. As the Seventh Circuit explained, Metal Spinners believed it was appropriate to eliminate Merillat's position because: (1) many of her functions could be taken over by a computer system; (2) her educational qualifications and narrow experience were weak in comparison to Wehr's; (3) she had a history of problems in the past, including difficulty getting along with co-workers and suppliers; and (4) Wehr was better able to introduce new strategies. App. 14a.

Merillat admitted the first of these four legitimate, non-discriminatory reasons, App. 14a, so the Seventh Circuit did not go on to analyze the others. Metal Spinners honestly believed in this reason for eliminating Merillat's position, and it was reasonable for Metal Spinners to believe it because it was true (as Merillat admitted). For this Court to reach a different result in Merillat's case, it would not only have to reject Merillat's admission regarding the computer system but would also have to accept Merillat's invitation to revisit Metal Spinners' personnel choices. Merillat's argument also depends on her allegation that her job and Wehr's job were the same, which is not supported by the evidence and which both the District Court and Seventh Circuit rejected. *Supra* pp. 7-8.

Further, to perform the evidentiary weighing Merillat suggests, this Court would have to engage in the very "super personnel department" work that myriad courts have said they should not and will not do. *See, e.g.*, *Balderston*, 328 F.3d at 324; *Bender*, 455 F.3d at 627. Merillat argues that Metal Spinners should have preferred her 19 years of experience inside Metal Spinners rather than Wehr's stronger formal education and more varied work experience in the metals industry. Pet. at 27. But the employer, not the courts, should be able to make decisions about how to weigh

education and experience. Moreover, as multiple circuits have acknowledged, a plaintiff's self-serving statements about her subjective belief that she was more qualified or a better performer than the retained employees are insufficient to create an issue of fact regarding pretext. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1196 (10th Cir. 2006); *Cichon v. Exelon Generation Co.*, 401 F.3d 803, 809 n.8 (7th Cir. 2005); *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1191 (8th Cir. 1995). Merillat also argues that Metal Spinners should have installed computer upgrades sooner, so she could have benefited from them. Pet. at 26. Again, the timing of the upgrading of the computer system was a business judgment that, absent evidence of discriminatory intent, the courts should not second-guess.

Also, Merillat repeatedly points to events that occurred *after* she was terminated as purported evidence of pretext. Pet. at 28 (discussing post-termination evaluations of Wehr and purportedly weaker "inventory control" under Wehr). As several circuits have stated, such after-the-fact evidence is not relevant to the analysis of pretext because the employer could not have considered such evidence when it made its reduction-in-force decision. *See Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001) (noting that court looks only at the facts before the employer at time decision was made); *Tyler*, 232 F.3d at 813-14 (stating that courts will not use "twenty-twenty hindsight" of the facts to second-guess the employer's business decisions); *Fischbach*, 86 F.3d at 1183 (stating that court will not review business decisions with "20/20 hindsight").

Merillat not only asks the courts to second-guess personnel decisions, she also asks for review of the board of directors' decision to reduce the number of employees. Merillat argues that the reduction-in-force was not legitimate

because, if Metal Spinners were actually trying to cut costs, it would have terminated the higher-paid Wehr rather than Merillat. Pet. at 25. On summary judgment, Merillat identified no record facts supporting her position or contradicting the financial statements Metal Spinners submitted to show its losses. Moreover, reductions-in-force do not involve just terminating the highest-paid employees of a business. They involve more complex analyses of costs and productivity, and the courts are generally in no position to second-guess such decisions.

Merillat's inability to establish a triable issue of fact regarding pretext is not all that surprising. In light of the undisputed facts established below, Merillat would have to identify facts supporting a highly implausible conspiracy motivated by bias towards her. She would have to show that, motivated by discriminatory animus, Metal Spinners was willing to lose money for several months *and* terminate three other individuals (all of whom were male and one of whom was under age 40) to cover up its biased decision aimed at her. Not surprisingly, Merillat was not able to designate any evidence to support this conspiracy theory. In the end, Merillat has simply failed to designate any evidence that supports her claim of pretext.

Based on the evidence in the record, this case would be decided in the same way even under the most liberal reading of the Sixth Circuit's formulation. In *Smith v. Chrysler*, the Sixth Circuit noted that "the key inquiry is whether the employer made a reasonably informed and considered business decision before taking an adverse employment action." *Smith*, 155 F.3d at 807. Here, the undisputed facts show that Metal Spinners realized it was losing money in 2003 and decided that a reduction in force was necessary to address its economic losses. C.A. App. 231-32, 241-43, 252-

55. Metal Spinners' management identified four positions that could be eliminated, including Merillat's. C.A. App. 236-38, 253-56. It chose to eliminate Merillat's position rather than Wehr's because it had reasonable grounds to believe that Wehr was the better, more qualified individual to retain. He had much more education, possessed different experience, and lacked Merillat's history of interpersonal difficulties with co-workers and suppliers. C.A. App. 197-98, 209-15, 230-32, 246-47. Also, many of Merillat's duties could be performed by a computer system. C.A. App. 274. Metal Spinners made a reasonably informed and considered business decision, as required by the Sixth Circuit's standard. This case is not the type that the Sixth Circuit expressed concern about in *Smith* where an employer made an uninformed and obviously erroneous decision to terminate an employee. *Smith*, 155 F.3d at 807.

B. The Reduction-in-Force Context Makes this a Poor Case to Address Pretext.

This case also is a poor vehicle for addressing any circuit split because of its origin in a reduction-in-force. None of the cases cited by Merillat in support of her claim of a circuit split involved a reduction-in-force. Rather, they involved terminations, *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 44 (1st Cir. 2002), *Smith*, 155 F.3d at 802-03, *Kariotis*, 131 F.3d at 674-75, *Villiarimo*, 282 F.3d at 1058-60, *Rojas v. Florida*, 285 F.3d 1339, 1341 (11th Cir. 2002); failure to hire, *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1286-87 (D.C. Cir. 1998), *E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 849-51 (4th Cir. 2001), *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1308-09 (10th Cir. 1999); and failure to renew a contract, *Ryther*, 108 F.3d at 834.

Reductions-in-force present a poor opportunity to address any circuit split because of the very narrow range of potential pretexts. In most cases, the reduction-in-force itself is the legitimate, nondiscriminatory reason for termination. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999). Accordingly, the only ways the plaintiff can prove pretext are by showing that the reduction in force itself was a pretext or showing that the reasons for including the plaintiff in the reduction-in-force were pretext. *See id.* at 373; *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1012-13 (7th Cir. 2000); *Pippin*, 440 F.3d at 1193.

In the reduction-in-force context, the purported split between the Circuits regarding pretext thus matters little. A reduction-in-force is usually necessitated by economic factors, and unless there is evidence that the reduction-in-force was fabricated or improperly manipulated to terminate the plaintiff there is usually not sufficient evidence of pretext to create a triable issue of fact.

This principle is demonstrated in cases from the Sixth and Seventh Circuits. The Sixth Circuit has stated that reductions-in-force "certainly qualify as legitimate, non-discriminatory reasons for the company's actions" and that, to overcome the assertion of a reduction-in-force, "plaintiffs must show, in essence, that [the employer's] 'business decision' was so lacking in merit as to call into question its genuineness" or that the evidence was "of sufficient significance itself to call into question the honesty of the employer's explanation." *Bender*, 455 F.3d at 624, 625, 627. Similarly, to prove pretext, the Seventh Circuit requires plaintiffs to show that the reduction-in-force was merely a sham to terminate employees in a protected class or that the employer did not have an honest, nondiscriminatory reason for including the plaintiff in the reduction-in-force. *Paluck*, 221 F.3d at 1012-13; *see also*

Schuster v. Lucent Tech., Inc., 327 F.3d 569, 574 (7th Cir. 2003) (stating that in a reduction-in-force case "an employee must establish that an improper motive tipped the balance in favor of discharge or that the employer did not honestly believe in the reasons it gave for firing him").

In reduction-in-force cases, the circuits apply very similar standards because employment decisions in such cases are dictated by outside economic forces, and often individuals who would not otherwise be targeted for dismissal are in fact terminated. Other circuits follow the approaches of the Sixth and Seventh Circuits, acknowledging that the issue of pretext is extremely narrow in the reduction-in-force context. *See, e.g.*, *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 252-53 (1st Cir. 2000) (limiting the analysis of pretext in reduction-in-force context to whether reduction-in-force itself was pretext or whether plaintiff was improperly included in the reduction-in-force); *Pippin*, 440 F.3d at 1193 (noting that in a reduction-in-force context the plaintiff can demonstrate pretext in only one of three ways, but in a "non-RIF context" the plaintiff can show pretext in variety of other ways).

The outcome of this case would not change under any version of the "honest belief" rule because Merillat failed to provide any evidence that Metal Spinners did not act on an honest belief that she was among the best candidates for termination or that its belief was not reasonable. Also, this case occurs in the context of a reduction-in-force, where the bases for arguing pretext are far narrower than in other contexts. It therefore is not a good case to resolve any circuit conflict relating to the "honest belief" rule.

CONCLUSION

There is no basis for certiorari here because any difference between the standards the circuits apply is more rhetorical than real. The cases show that all circuits look at both the employer's honest belief in its reasons for taking adverse employment action and the reasonableness of that honest belief. Morever, this case is not appropriate for resolving any discrepancy among the circuits because Merillat's claim would not succeed under any circuit's standard and there is no indication of a circuit split in cases such as hers, involving reductions-in-force.

This Court should deny the petition.

Respectfully submitted,

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